APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI FILED JULY 8, 1974

WRIT OF CERTIORARI GRANTED OCTOBER, 21, 1974.

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RELEVANT DOCKET ENTRIES— DISTRICT COURT.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendant of the Southern Regional Center Clinic, California Youth Authority, Respondents. 71-2907-LTL.

Date	Proceedings
12/10/71	—Filed order (ALS) that action may be filed without prepayment of filing fee and that further action proceedings be subject to order of Court. Filed Petitioner's application for leave to proceed in forma pauperis. Filed affidavit of Donald W. Pike. Filed affidavit of Robert L. Walker. Filed Petition for Order appointing Guardian Ad Litem. Filed order (ALS) that Lola Mae Jones be appointed as Guardian Ad Litem of Minor Gary Steven Jones. LODGED Order granting leave to proceed in Forma Pauperis NOT signed. Filed Petition for a Writ of Habeas Corpus for Release of Person from State Custody. Filed Petitioner's Points and Authorities in support of Relator's Petition for Writ of Habeas Corpus. Issued summons.
12/16/71	—Filed petitioner's application of non-resident attorney to appear in a specific case and order (LTL) by naming Robert L. Walker.
12/20/71	—Filed order (LTL) requiring response to petition for writ of habeas corpus.
1972	
1/10/72	—Filed respondent's response to petition for writ of habeas corpus.
1/13/72	—Filed petitioner's reply memo.
1/20/72	—Filed petitioner's certificate of service.
1/27/72	—Filed order (LTL) for hearing to be set 3/6/72, 10 a.m.

3/6/72—Held hearing and entered order (LTL) Petitioner's petition for Order to Show Cause why petition for writ of habeas corpus should not be issued is order submitted (LTL).

5/5/72—Filed memorandum and order denying petition for writ of habeas corpus and notified parties.

6/5/72—Filed petitioner's NOTICE OF APPEAL. Filed petitioner's Designation of Record on Appeal. Filed petitioner's Certificate of Service.

6/9/72—Filed petitioner's petition for certificate of probable cause.

6/21/72—Filed order (LTL) of petition for Certificate of Probable Cause in the above matter denied.

9/5/72—Received from Court of Appeals copy of order of Court of Appeals granting certificate of probable cause.

9/6/72—Issued and forwarded to Court of Appeals original record on appeal.

9/25/72—Filed motion, affidavit and order re Appeal in Forma Pauperis—Motion denied (LTL)

9/27/72—Received from Court of Appeals copy of order of Court of Appeals permitting pauper appeal.

RELEVANT DOCKET ENTRIES— COURT OF APPEALS.

United States Court of Appeals for the Ninth Circuit.

D.C. No. 71-2907-LTL.

D.C. Judge L.T. Lydick.

Notice of appeal filed 6-5-72.

497 Fed. Rep. 2nd. p. 1160.

Filed in DC: 12-10-71.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem. Petitioner-Appellant, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. 72-2644.

For Appellant: Peter Bull, Esq. and Robert L. Walker, Esq. of the Youth Law Center.

For Appellees: Evelle J. Younger, Calif. Atty. General and Russell Iungerich, Deputy Atty. General.

72-2644

Date	Filings—Proceedings
1972	
Sept. 19	Filed certified transcript of record on appeal (received Sept. 7, 1972) in one volume, pleadings, original copy.
Sept. 19	Docket fee paid, cause docketed and entered appearances of counsel.
Sept. 20	Received original and 3 copies of motion for leave to appeal in forma pauperis.

Sept. 25—Filed order granting motion requesting leave to appeal in forma pauperis.

Oct. 6—Sent one copy of one-volume record to appellant's counsel Walker, Youth Law Center; Appellant's opening brief due Nov. 15, 1972.

Nov. 13—Received original and 3 appellant's motion for extension of time to file brief.

Nov. 13—Received letter of 11/9 from U.S. Attorney regarding possible motion to dismiss appeal.

Nov. 16—Filed motion and order extending time to file appellant's brief to Dec. 15, 1972.

Dec. 12—Filed 25 Appellant's Briefs.

1973

Jan. 14—Filed 25 Appellee's Briefs.

Jan. 29—Filed 25 Appellant's Reply Briefs.

1974

Jan. 7—Received letter from appellant's counsel Pike advising of his withdrawal as one of appellant's counsel.

Jan. 17—Received letter from appellant regarding additional citation, with copies of 5th Circuit decision in *Fain v. Duff*.

Feb. 24—Argued and submitted to: Goodwin, Wallace, C.J.J., East, D.J.

Mar. 19—Received appellant's letter with copies of documents requested by clerk March 12, 1974.

Mar. 25—Received appellant's letter submitting 4 copies of Section 34 of Uniform Juvenile Court Act.

May 15—Ordered opinion (Wallace) filed and judgment to be filed and entered.

May 15—Filed opinion—reversed with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition.

May 15—Filed and entered judgment.

May 31—Filed appellee's motion for stay of mandate.

June 3—Filed appellant's opposition to motion for stay.

June 18—Filed Order Staying Mandate to 7/5/74.

July 8—Advised by Supreme Court (Miss Lazowski) that petition for certiorari filed 7/8/74—Supreme Court No. 73-1995.

July 15—Filed Supreme Court notice re: filing petition for certiorari July 8, 1974 S.C. #73-1995.

PETITION FOR WRIT OF HABEAS CORPUS.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

Filed: Dec. 10, 1971.

TO: THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

The petition of LOLA MAE JONES, on behalf of minor GARY STEVEN JONES, respectfully shows:

1. I am the mother of GARY STEVEN JONES, an eighteen year old minor, on whose behalf the present petition is brought. I am the duly designated guardian ad litem for purposes of bringing this petition and am personally authorized by the minor to make this application on his behalf.

2. Said minor is presently confined at California Youth Authority's Southern Regional Reception Center Clinic, whose street address is 13200 South Bloomfield Avenue, Norwalk, California. He is restrained of his liberty by ALLEN F. BREED, Director of the California Youth Authority, and by ROBERT McKIBBEN, Superintendent of the C.Y.A. Southern Regional Reception Center Clinic. Said minor is confined pursuant to an order of the Superior Court for the County of Los Angeles, entered October 21, 1971, finding Gary Steven Jones guilty of robbery in the

first degree and committing him to the California Youth Authority.

3. The Superior Court order pursuant to which the minor is confined is patently illegal because Gary had previously been placed in jeopardy by the Superior Court of Los Angeles County, Juvenile Court Department, which on March 1, 1971 found him to be a juvenile delinquent under California Welfare and Institution Code § 602. This adjudication was based upon the identical armed robbery incident for which Gary was later prosecuted in adult court and convicted of violating Penal Code § 211. This second prosecution and conviction of said minor for the same incident for which he had previously been adjudged a juvenile delinquent was in violation of his right not to be twice placed in jeopardy guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

4. The pertinent facts are as follows. On February 9, 1971 a petition was filed against said minor in the Superior Court of Los Angeles County, Juvenile Court Department, under case # 394,221. This petition alleged that he was a juvenile delinquent in that he had committed acts which—if he were an adult—would constitute a violation of Cal. Penal Code Section 211 [the juvenile court petition is annexed as Exhibit "D"].

5. A detention hearing was conducted on February 10, 1971 at the conclusion of which the juvenile court ordered the minor detained. The jurisdictional hearing was held before Referee Jules D. Barnett on March 1, 1971. After hearing testimony, including the testimony of Gary Steven Jones, the court sustained the petition, specifically finding that the minor was a person

described by Section 602 of the Juvenile Court Law. The Court also ordered that the minor should remain detained at Juvenile Hall [the findings and order of Referee Barnett are annexed hereto as Exhibit "E"].

6. Said minor was represented by court-appointed counsel at both the detention and jurisdictional hearings. On March 15, 1971 the Court appointed Donald W. Pike, Esq., co-counsel herein, to represent the minor at the dispositional hearing. Pursuant to Section 707 of the Cal. W&I Code, the court at that hearing announced its intention to find that the minor was not amenable to the Juvenile Court processes and to direct the district attorney to prosecute the minor under Section 211 of the Penal Code. Counsel objected, and the probation officer was ordered to submit a behavioral report. The minor was remanded to the custody of the sheriff.

7. On March 22, 1971 counsel submitted written points and authorities which challenged the contemplated 707 procedure on double jeopardy and due process grounds. Acting upon the recommendation of the Probation Department, the court overruled counsel's objections, remanded the minor to the sheriff's custody, and ordered that the minor be prosecuted as an adult [the Reporter's Transcript of these proceedings is annexed as Exhibit "F"].

8. A petition for a writ of habeas corpus was prepared and filed with the Superior Court of the State of California for the County of Los Angeles. In the writ petitioner specifically argued that he was being denied his federal constitutional right not to be twice placed in jeopardy. After hearing oral argument on April 2, 1971, the Honorable Marvin A. Freeman

denied the writ on the basis that relator's statutory and constitutional rights had not been violated [the minute order of the Court and Reporter's Transcript are annexed as Exhibits "G" & H""]. Donald Pike, co-counsel herein, was appointed to represent the minor in the adult proceedings and to take any appropriate steps to review the court's order.

9. Subsequently, a petition for a writ of habeas corpus raising the same constitutional and statutory claims was filed in the California Court of Appeal, Second Appellate District, under Crim. # 19956. On April 12, 1971 the court stayed the pending criminal prosecution of the minor. An order to show cause was issued on May 7, 1971, and on May 19, 1971 the court denied the petition in an opinion by Justice Kingsley which is reported at 17 Cal.App.3d 704, 95 Cal.Rptr. 185 [annexed hereto as Exhibit "C"]. The court rejected petitioner's contentions on the merits, and held that although jeopardy had attached in the original juvenile court proceeding, no new jeopardy would attach in the subsequent prosecution in adult court.

10. Subsequently, a petition for hearing was filed with the California Supreme Court raising the same constitutional and other claims. On August 4, 1971 the Court denied a hearing [a photostatic copy of the post card apprising petitioner of the court's decision is annexed as Exhibit "I"].

11. On August 23, 1971 a preliminary hearing was conducted in the Municipal Court, South Bay District, Los Angeles County, under case No. A 174204 before the Honorable George R. Perkovich. The hearing was held pursuant to a complaint charging GARY STEVEN JONES with having committed armed robbery on or about February 8, 1971. Defendant entered a plea of

not guilty and a plea of once in jeopardy and once convicted and submitted this latter plea in writing [Exhibit "J"]. At the conclusion of the hearing defendant was remanded to Superior Court [the Reporter's Transcript is annexed as Exhibit "K"].

12. On September 3, 1971 a felony information [Exhibit "L"] was filed against the minor in case No. A-174204 charging him with robbery in violation of Penal Code § 211. Defendant pleaded not guilty, and on September 29, 1971 the cause was submitted to the Honorable Auten F. Bush, sitting without a jury, on the transcript of the preliminary hearing, and defendant was convicted of violating Penal Code § 211 [minute order annexed as Exhibit "M"]. On October 20, 1971 the minor was committed by the Court to the California Youth Authority [minute order annexed as Exhibit "N"].

13. During all of the criminal proceedings in the Municipal and Superior Courts defendant was represented by his court-appointed counsel, and co-counsel herein, Donald W. Pike. During the proceeding in the California Court of Appeal and on his application for a petition for hearing to the California Supreme Court, the minor was represented by Donald W. Pike, Peter Bull, and Robert L. Walker, his counsel herein.

14. Upon the advice of counsel no appeal has been sought from the judgment of the Superior Court of Los Angeles County convicting said minor of robbery in the first degree. It is the considered opinion of petitioner, minor, and counsel [see affidavit of Donald W. Pike annexed as Exhibit "A" and incorporated by reference herein] that the only appealable issue in this case is whether said minor has been twice placed in jeopardy in violation of his constitutional rights. This

argument has already been presented to, and rejected by, both the California Court of Appeal and the Supreme Court of California. The minor has thus exhausted his state remedies under 28 U.S.C. § 2254, and presenting the same arguments to the same courts a second time would be futile and ineffective to protect his rights.

15. This petition has been prepared by attorney Robert L. Walker. According to his annexed affidavit [Exhibit "B" incorporated by reference herein], this petition contains all of the information required by Local Rule 19 of the Rules of this Court.

16. As a result of his criminal conviction for armed robbery, GARY STEVEN JONES suffers from many disabilities which would not exist if he were merely a ward of the juvenile court. He is a convicted felon (Cal. Penal Code §§ 17, 213) and is, therefore, not entitled to have his conviction record sealed (see Cal. Penal Code § 1203.45), whereas all juvenile court records are sealable under Cal. W&I Code § 781. Although there is no way to determine if the juvenile court would have committed Gary to the California Youth Authority, the potential duration of his commitment to the Youth Authority by the juvenile court could have been until he reached age twenty-one (Cal. W&I Code § 1769), whereas presently he may remain in the Youth Authority until he reaches age twenty-five (Cal. W&I Code § 1771). In addition, under certain conditions the Youth Authority may return him to Superior Court for sentencing to state prison (Cal. W&I § 1737.1). But he could never be sentenced to state prison once he was committed to the Youth Authority as a ward of the juvenile court even if he were returned by the Youth Authority as incorrigible. Other ways in which the minor petitioner is seriously prejudiced

by his unlawful conviction as an adult felon are fully set forth in Point IV of his Points and Authorities filed with this petition.

17. Because of the foregoing facts, GARY STEVEN JONES is being restrained of his liberty in violation of the Constitution of the United States. The waiver of minor to adult court pursuant to Cal. W&I Code § 707 and subsequent trial of minor in adult court after jeopardy had attached in the juvenile proceeding placed him in double jeopardy. Since Cal. W&I Code § 707 has been construed by California state courts to authorize this procedure, that statute is unconstitutional.

WHEREFORE, it is respectfully prayed that a writ of habeas corpus issue directing said minor's release from the unlawful detention and remanding said minor to the custody of the Juvenile Court of Los Angeles County for disposition pursuant to that Court's previous finding that the minor is a person described by Section 602 of the California Welfare and Institutions Code, or in the alternative, this Court should issue an order directing respondents BREED and MC KIBBEN (depending upon whether Gary has been transferred to the Youth Authority's Southern Regional Reception Center Clinic) or their legal representative, to show cause why such a writ should not issue, and for such other and further relief as law and justice may require.

Subscribed and sworn to before me this 24th day of November, 1971.

/s/ Lola Mae Jones
Lola Mae Jones

/s/ G. L. Washington
Notary Public

EXHIBIT A—AFFIDAVIT OF DONALD W. PIKE.

(This exhibit has been omitted because it pertains only to the question of exhaustion of state remedies.)

EXHIBIT B—AFFIDAVIT OF ROBERT L. WALKER.

(This exhibit has been omitted because it pertains only to compliance with local Rules of Court.)

EXHIBIT C—OPINION OF THE CALIFORNIA COURT OF APPEAL.

(This exhibit has been omitted from this Appendix because it appears as Appendix C to the Petition for Writ of Certiorari, pages 20-27.)

EXHIBIT D—JUVENILE COURT PETITION.

Superior Court of California, County of Los Angeles Juvenile Court.

PETITION

In the Matter of Gary Stephen Jones, a minor. Number 394221-0317197-SC-ACT.

Petitioner is informed and believes and therefore alleges, that Gary Stephen Jones, hereinafter called minor, resides at 943 West 134th Street, Compton, California, and was born on 6/22/53 and was 17 years of age on June 22, 1970, and comes within the provisions of Section 602 of the Welfare and Institutions Code of California, in that: said minor, on or about February 8, 1971 at 16201 South Hawthorne Boulevard, County of Los Angeles, did willfully and unlawfully by means of force and fear take from the person, possession, and immediate presence of James Mattera, the following described personal property to wit: a cash register containing money; thereby violating Section 211 of the Penal Code of California.

Further, at the time of the commission of the above offense, the minor was armed with a deadly weapon, to wit: a gun.

The name and residence address of each parent and guardian of minor, known to me, is as follows: Mother: Lola Jones, 943 West 134th Street, Compton, California.

Minor was taken into custody by Lennox Sheriff's Station on 2/8/71 at 10:10 P.M. Minor is detained. The present whereabouts of minor is Juvenile Hall.

Therefore, petitioner respectfully requests that this minor be adjudged and declared a ward of the Juvenile Court and dealt with as such.

KENNETH E. KIRKPATRICK,
PROBATION OFFICER, Petitioner
By /s/ T. Fay
T. FAY, IDC
Deputy Probation Officer

I certify under penalty of perjury that the foregoing is true and correct, according to my information and belief.

Executed at (City)
LOS ANGELES, California
/s/ T. Fay
Signed

EXHIBIT E—FINDINGS AND ORDER OF JUVENILE COURT REFEREE.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court.

Date: March 1, 1971.

Hrg. Room 5.

Judge:

Referee: Jules D. Barnett.

Deputy Clerk: Marie Franks.

Deputy Sheriff: Ralph Calderon.

Probation Officer: S. Canin.

DPSS Social Worker: .....

Reporter: Irma Demar.

In the Matter of Gary Stephen Jones, 17 years of age, a minor. No. 394221-0317197-SC.

FINDINGS AND ORDER OF REFEREE

Appearances: Attorneys: Stephen Behrendt; Deputy District Attorney, Norman F. Montrose.

Adjudication Proceedings: The 602 petition filed February 10, 1971, is read to those present, and the minor and any parent or guardian or adult relative are informed of their right to counsel, the nature of the hearing, its procedures and possible consequences.

Pursuant to Section 700 of the Juvenile Court Law, conflict matter, Private Counsel is appointed as counsel for minor.

The parent or guardian or adult relative present, being advised of his rights, indicates his desire to proceed without independent counsel.

Minor denies the allegations in paragraph I of the petition filed February 10, 1971 (as amended).

Minor with the advice of counsel waived his rights and testified.

Sworn and Testifying: Minor; James Matern; Dep. Frank Gomez, LASO.

Sworn Only: Deps. Fred Laxon and William Hess, LASO.

The Court Orders:

Petitioner's Exhibits 1 (black cash register tray); 2 (.38 calibre Smith and Wesson, brown wood handle, Serial No. 28880); 3 (.38 calibre Iver Johnson, Serial No. G 30691) and 4 (blue woolen cap) are admitted into evidence by reference to Case No. A 173344, Superior Court.

THE COURT FINDS:

1. That notice of this hearing has been duly given as required by law.

2. That minor was born on June 22, 1953.

3. That the allegations of the petition filed February 10, 1971 (as amended) are true, and the petition is sustained.

4. That minor is a person described by Section 602 of the Juvenile Court Law.

THE COURT ORDERS:

That minor shall remain detained at Juvenile Hall pending the disposition hearing.

Proceedings continued for disposition to the appearance calendar of March 15, 1971, at 9:00 a.m. in Dept. L.A.

All parties present to return on that date without further order, notice or subpoena.

/s/ Jules D. Barnett
Referee of Juvenile Court

This Order Was Entered.

William G. Sharp,
County Clerk and
Clerk of the Superior Court

Names and addresses of persons to be served with copies of this order:

Minor: Juvenile Hall.

Mother: Lola Jones, 943 West 134th Street, Compton, California.

Attorney: Stephen Behrendt, 9465 Wilshire Boulevard, Beverly Hills.

EXHIBIT F—REPORTER'S TRANSCRIPT OF JUVENILE COURT PROCEEDINGS, MARCH 15, 22, 1971.

Superior Court of the State of California, for the County of Los Angeles.

Hearing Room No. 5.

Hon. Jules D. Barnett, Commissioner.

In the matter of Gary Steven Jones, a person under the age of 21 years. No. 394221.

REPORTER'S TRANSCRIPT

March 15, 1971.

March 22, 1971.

APPEARANCES:

For the Minor: Donald W. Pike, Esq., 424 South Beverly Drive, Beverly Hills, California.

Also present: Gary Steven Jones, Minor; Minor's mother; Eileen Harney, Probation Officer; Ann Chaus, Court Officer; Robert E. Knourek, CSR Official Pro Tem, 1601 Eastlake, Los Angeles, California.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 15, 1971; A.M.

THE COURT: We have the matter of Gary Steven Jones coming up. Mr. Pike represents the young man and we have the mother of the young man here. And do we have any communication with Mr. Jones, the father? I note a different address.

MINOR'S MOTHER: We are divorced.

THE COURT: I know that.

(Discussion.)

THE COURT: All right, we will proceed. We have the probation officer in this matter.

MISS HARNEY: Eileen Harney H-a-r-n-e-y.

THE COURT: Would you all please stand and raise your right hands?

(Whereupon the Court administered the oath to all the people in the courtroom.)

THE COURT: Be seated please.

We have a probation officer's report and recommendation to be considered. This, of course, is triggered by a petition which was sustained after the taking of testimony in this court and the Court has read and considered the recommendation and receives it into evidence and the recommendation here is two-fold—I guess—that the Minor be considered for unfitness and/or be committed to the Youth Authority.

And I will hear your comments, Mr. Pike.

MR. PIKE: Well, your Honor, I am placed in a position here with this report making the 707 recommendation, that if the Court gave an indication that there was—that it was going to follow that recommendation, I would have a different argument, I believe.

THE COURT: Well, we have a technical problem here of which you are aware that prior to a declaration of unfitness being made, we must receive and consider a behavioral report.

MR. PIKE: Yes.

THE COURT: Of course, we can do violence to procedure by considering this report a behavioral report and it might well be the same thing.

However, the thing which concerns me is quote why I didn't consider a behavioral report when I heard this matter and the only explanation I may have is that I must have considered it and yet disregarded it for some reason.

The report of this young man is truly horrendous and I recall the case and the testimony taken and we have the probation officer in court and it would appear that the sum total of what has gone before may well be having undue influence upon me.

MR. PIKE: It would appear to me, your Honor, that this is a proper case for the California Youth Authority facilities, particularly in view of the psychiatric discussion that is contained within the report, because I am not aware of any County facility which would have the kind of examination that this Minor is obviously in need of.

THE COURT: Oh, now, the only question here is whether we CYA the youngster or declare him unfit.

I will hear you Miss Harney, if you have any comment to—

MISS HARNEY: Well, actually my original recommendation one would be CYA because of his psychiatric elements and which I discussed with my superior and they felt that it wasn't enough, so to speak, but I still feel, personally, that CYA would be proper because even though the acts committed are extremely serious in nature, I do feel that the Minor is still somewhat immature and does have extreme problems which I think need to be met and my feelings would be that they might not be met if he was considered unfit and declared adult.

THE COURT: I happen to disagree with you.

They have the same facilities in adult court that they have in juvenile court. They have greater facilities. This young man has been a gun man ever since he started. His whole history is replete with the use of guns and it is a pretty alarming situation—16 and a half years old, right?

MR. PIKE: (Nodding his head.)

THE COURT: Is that correct?

MISS HARNEY: No, 17.

MINOR'S MOTHER: He is 17.

MISS HARNEY: He will be 18 in June.

THE COURT: He will be 18 in June.

MR. PIKE: He hasn't been to a camp at all, your Honor. I understand that is—

THE COURT: No, Mr. Pike. All I see here—this, of course, is the most alarming thing I have seen in my life.

This youngster goes back with guns to 1970—loaded .22 caliber Browning automatic pistol in his pocket.

There was a behavioral—an unfitness hearing held in June of 1970 and he was continued as a juvenile.

And, again in 1970, the second gun charge—am I right, Mr. Pike, in reading the file?

MR. PIKE: That is correct.

THE COURT: He has two gun charges in 1970 and then he has another gun charge in front of me. And he has two companions against whom proceedings are being held pending as adults for this same affair; is that correct?

MR. PIKE: I am not sure about that, your Honor.

MISS HARNEY: Yes, one of those was previously on a juvenile case load at South Central, but it is now being tried as an adult and the other one wasn't an adult—a sibling.

THE COURT: Right. Three times arrested; three times use of a gun. I am going to have to consider this for unfitness.

MR. PIKE: Your Honor, at this time I would make a motion to continue the matter on the ground of surprise.

Minor was not informed that it was going to be a fitness hearing.

MISS HARNEY: Minor was informed.

THE COURT: Just a moment. When was that—just a moment, finish the statement.

MR. PIKE: At the time Minor was last in court, it was continued for disposition hearing, and counsel at that time would have advised the Minor with regard to handling the matter as a juvenile on a disposition hearing, had I been his counsel.

However, I would also move to strike this report on the grounds that the probation officer, in preparing a disposition matter where the Minor doesn't know that she is preparing for a fitness hearing, has disclosed confidences to his probation officer which I would move to strike.

I move to strike the disposition report from the file and have it removed from the file and on the grounds that there has been a miscarriage—a lack of due process under the 14th Amendment and a breach of the confidential relationship established between the Minor and the probation officer.

THE COURT: Insofar as striking the report, that motion is denied.

However, we will, under the circumstances, set this for the technical behavioral report procedures. Notice must be given, and notice is hereby given officially.

The matter will be set for one week hence and you will prepare a behavioral report, Miss Harney, and in the interim the youngster will be confined in the County Jail.

MR. PIKE: May I, for the record, make one other objection, your Honor? I would object on the grounds of violation of the 6th Amendment of the Constitution

of the United States, that this Minor has been subjected to double jeopardy and further objection—violation of the 6th Amendment, that after adjudication that the Minor is being subjected to additional punishment more than would be rendered under the juvenile court at the time of the adjudication and it must only be for grounds that occurred prior to the time of the adjudication and I would ask the Court permission to submit written points and authorities and on the grounds that the Supreme Court ruled in the case—in New Jersey that punishment cannot be increased after the adjudication hearing except for offenses for matters that occurred after the time of the adjudication.

There are two United States Supreme Court cases, two years ago.

THE COURT: Mr. Pike, this Court takes strong issue when you use the words "punishment increased". We are concerned with the rehabilitation of this youngster and we feel that the facilities of the juvenile court may not be sufficient as I have indicated to you.

I have not precluded or foreclosed any further argument by you. Now, about whether as a personal matter you can continue with this matter, that is something that I don't know. Do you wish to submit findings in any event?

MR. PIKE: I would like to write a memorandum.

THE COURT: I commend you for that and appreciate your intent and it will go back on my calendar for the purpose of accepting it. It might not be accepted before another commissioner.

If you will, I would appreciate your points and authorities sent to my attention for me to consider at the behavioral hearing which will be a week from today on the 22nd.

MISS CHAUS: Do you wish the behavioral report—this report would not be any different from the report that is now—

THE COURT: Miss Chaus, the requirements of the statute are that we receive a behavioral report, and no disrespect to counsel, there is no need to leave open a procedural hole in the proceedings here.

So we will have to do it just as the requirements are set forth. I will put this notation down to myself. Attorney Pike is to send points and authorities to me and I state for the record that I shall consider the said points and authorities prior to my making a ruling; the ruling which I have not in any way indicated, but I wish to explore the entire possibility and the matter will be set down on my calendar.

MISS HARNEY: Your Honor, is it possible that during this week's period to have a private psychiatric report?

THE COURT: No, I don't know if it can be arranged through the—

MISS HARNEY: I noticed that at the last fitness hearing that the Minor had—there was a psychiatric report submitted.

THE COURT: This is 1970. It is not that far back that we have to have a new one.

MISS HARNEY: It was not submitted into court records. It was submitted for the eyes of the Minor's counsel only.

THE COURT: I can only assume that the psychiatric report is not helpful in any way to the Minor.

Mr. Pike, I am glad that you concur with that.

MR. PIKE: That is correct.

THE COURT: Submit your report at the behavioral hearing—what you know about the youngster's back-

ground, et cetera, et cetera—on my calendar on the 22nd—3/22.

One final factor, Miss Chaus: We have an address of the father and make sure that he is served.

MISS CHAUS: Yes, sir.

THE COURT: My calendar, 3/22/71; and detained pending and at the County Jail.

MR. PIKE: County Jail.

THE COURT: That is right, and we will have it set for 9:00 o'clock in the morning.

Thank you very much. That is all. See you all back here then.

MINOR'S MOTHER: May I visit with him?

THE COURT: I am sorry. Since he is in the County Jail—what are the visiting hours?

MR. PIKE: I am not sure.

THE COURT: I think that you can during the week.

MR. PIKE: Between 10:00 and 12:00 and 2:00 or something in the afternoon.

THE COURT: Yes, at the County Jail facility.

Thank you.

LOS ANGELES, CALIFORNIA
MONDAY, MARCH 22, 1971; A.M.

THE COURT: We have the matter of Gary Steven Jones.

The youngster is here in court and is that you Gary?

THE MINOR: Yes.

THE COURT: And is the mother here?

MINOR'S MOTHER: Yes.

THE COURT: And Mr. Pike represents the youngster.

Would you both please stand and raise your right hands?

MISS CHAUS: Sir, the field probation officer.

THE COURT: Miss field probation officer, your name is?

MISS HARNEY: Eileen Harney H-a-r-n-e-y.

THE COURT: Would you please stand and raise your right hands?

(Whereupon the Court administered the oath to all the people in the courtroom.)

THE COURT: Be seated please.

When last you were in court, young man, a petition filed on your behalf was found true and just so that the record is quite clear, by the Court's sustaining the petition and found that you came within the provisions of Section 602 of the Welfare and Institutions Code. At that time—

This Court requests a behavioral report to be filed so that the issue of whether you are fit for further consideration as a juvenile can be raised and can be done in compliance with the statute.

The Court has for its consideration a behavioral report which it has read and considered together with all of the other information in the file, and it is the Court's intent to declare the youngster unfit for further treatment as a juvenile, and I will hear you, Mr. Pike.

MR. PIKE: Your Honor, it seemed to me that there was a hearing in this court where the Court found him to come within Section 602 and then it was continued for disposition.

THE COURT: Yes.

MR. PIKE: Is that correct?

THE COURT: Yes.

MR. PIKE: And that at the time of the disposition hearing the Matter was then again continued for five days for the fitness hearing which we are here for today.

THE COURT: (Nodding his head.)

MR. PIKE: Is that correct?

MISS CHAUS: Yes.

THE COURT: I will accept your recollection.

MR. PIKE: I offer in evidence a memorandum of points and authorities relating to this matter and—

THE COURT: Let the record reflect the fact that the Court has read it and discussed it actually with you. Is that correct?

MR. PIKE: Yes.

THE COURT: You may proceed. The memorandum is received into evidence.

MR. PIKE: Without going into argument on the memorandum of points and authorities, I would like, at this time, to call Eileen Harney.

THE COURT: Miss Harney, come up here, please.

EILEEN HARNEY,

a witness previously sworn, was examined and testified as follows:

THE COURT REPORTER: State your name, please.

THE WITNESS: Eileen E-i-l-e-e-n Harney H-a-r-n-e-y.

EXAMINATION

BY MR. PIKE:

Q Miss Harney, I have reviewed the report that you have submitted to the Court this morning which is dated March the 22nd, and in the first paragraph of that report you state, "reason for hearing," but I don't find a recommendation in the report.

A Well, according to the records that I found in the office it stated that a behavioral hearing is requested—that you submit a behavioral hearing and you do not necessarily make a recommendation.

Q I see. Are you familiar with the facilities available through the California Yough Authority for treatment of this Minor?

A In the past I am aware that the facilities have been quite good in the psychiatric department which is where I feel that the Minor needs help.

However, at this time, I am told that they are not as good as they have been.

Q Are you familiar with the facilities that are available through the adult authority for the treatment of a Minor?

A I believe those could be a variety of facilities.

Q But you are not familiar with them, are you?

A Beyond the fact of Wayside, County Jail and Youth Authority, not too much.

Q And do you have any information with regard to the handling of a Minor by the adult authorities after he has been declared unfit and if he were convicted as an adult?

A I do not, although I believe that he would probably be committed to the Youth Authority.

Q Do you know the reception centers it has in the State of California?

A No, I do not.

Q And so it is your belief that he would then go to the same Youth Authority?

A That's what I understand, but I do not know that to be a point of law.

MR. PIKE: No further questions.

THE COURT: Thank you very much, Miss Harney.

MR. PIKE: Your Honor, I personally called the local administrative office of the Youth Authority and discussed it with them, what possibly might happen to this Minor if he were convicted as an adult, and they tell me there are three reception centers in California.

One at Perkins, one at Tracy and one at Norwalk. That the facility at Tracy is being phased out by the Youth Authority and that 25 percent of the people they normally used to send to Tracy are now being sent to Norwalk and from the southern part of the state—25 percent from the northern part of the state that used to be sent to Tracy are now being sent to Perkins.

Originally Perkins and Norwalk received minors from juvenile court largely and Tracy received minors and adults from the adult court, but that most minors were sent to Norwalk from the adult court and only in exceptionally dangerous cases or exceptionally large persons under the age of 18 were sent to Tracy and that the local office's evaluation was that this minor would go to Norwalk if he were convicted as an adult.

Further that it was their policy now to attempt to separate Youth Authority persons from any adult authority person which means previously Tracy has been used as a reception center for both adults and Youth Authority and that it was the policy of the Youth Authority and adult authority that in the future they would attempt to treat at separate facilities persons committed to Youth Authority whether or not they were over the age of 18.

I visited the area in the County Jail where this Minor is detained and I was informed by the jailer that on his 18th birthday he would be removed from that facility and thereafter housed with the general population at County Jail without any special facilities.

The special facilities in which he is detained now are very primitive—three to a cell and probably the cell is about 8 by 12—8 by 14 with no windows and very close to the attorney room in the County Jail.

MISS HARNEY: He has been moved from that particular cell.

THE COURT: That is all right. Let counsel finish his argument.

MR. PIKE: I would argue that first—that the points and authorities set forth my feeling with regard to the improper hearing of a 707 at this time; and further I would argue that if the Court does find this boy to be unfit, that it is cruel and unusual punishment to send the Minor to the County Jail for a period of time that will be probably 90 to 120 days before he gets to sentencing again; when he will, in fact, go to the same reception center of the Youth Authority that he would go to from here—that we are not here to punish.

We are here to rehabilitate and that rehabilitation can only be impaired if the Minor is put in some kind of a primitive holding cell between now and the time that he finally works his way down to the Youth Authority.

THE COURT: Anything else?

MR. PIKE: No, your Honor.

THE COURT: Mr. Pike, your argument is not novel, actually, but it actually sets forth the reverse side of the Jimmy H. coin.

Jimmy H. says one of the factors—that merely because the disposition would be different if he were declared an adult, is not enough reason to declare him adult.

You, of course, espouse the other side of the coin. Merely because he should be a juvenile—so following Jimmy H. to its logical conclusion, the aspect of what will or will not happen should have no total bearing in these sense that it shouldn't be the complete—as Jimmy H. said—complete motivating factor.

So within the purview of that case, and within the purview of the Brown case which you are familiar with, the Court feels that the Minor is not a fit and proper subject to be dealt with as a juvenile and will declare him unfit.

This record I have read is one of the most threatening records I have read about any Minor who has come before me.

We have, as a matter of simple fact, no less than three armed robberies, each with a loaded weapon. The degree of delinquency which that represents, the degree of sophistication which that represents and the degree of impossibility of assistance as a juvenile which that represents, I think is overwhelming and bearing in mind that factor and all other factors which are relevant, all of which I have read and evaluated, I declare the youngster unfit for treatment as a juvenile and he will be turned over to the Sheriff and the District Attorney or other appropriate prosecuting officers shall prosecute the matter under the applicable criminal statute and the matter will be set over one month for a nonappearance report as to the progress of the adult action.

That is it, young fellow.

(Certifications and affidavits of service omitted in printing.)

EXHIBIT G—JUVENILE COURT MINUTE ORDER, APRIL 1, 1971.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court. Dept. 96.

Date: April 1, 1971.

Judge: Marvin A. Freeman.

Referee: .....

Deputy Clerk: N. Shigeoka.

Deputy Sheriff: A. M. Simpson.

Probation Officer: S. Canin.

DPSS Social Worker:

Reporter H. McCrea.

In the Matter of Gary Stephen Jones, a minor. No. 394221-0317197-SC 162.

MINUTE ORDER

Matter comes before the Court for hearing in re: Ex Parte Application for Petition for Writ of Habeas Corpus.

Attorney Donald Pike is appointed to represent minor pursuant to Section 700 of the Welfare and Institutions Code.

Petition for Writ of Habeas Corpus, preliminary statement, and Points and Authorities submitted In Propria Persona by minor's mother, Lola Jones, is received as filed by counsel, Donald Pike.

The Court states that in view of the importance of the issues which have been raised in the ex parte application for Petition for Writ of Habeas Corpus, the Court will hear oral argument on the Petition.

Matter is argued by counsel for the minor.

The Court now orders that the Petition for Writ of Habeas Corpus be denied.

Court Reporter, Helena Mc Crea, is ordered to prepare a transcript (original and two copies) of the proceedings held this date at a cost to the County of Los Angeles.

Counsel, Donald Pike, is further appointed to represent minor in the adult proceedings pursuant to Section 987.2 of the Penal Code of California, and to prosecute appeal, or take other appropriate proceedings to review the instant order.

The Clerk is directed to forward a copy of this minute order to Attorney Donald Pike, 424 South Beverly Drive, Beverly Hills, California 90212; and Helena Mc Crea, court reporter.

EXHIBIT H—REPORTER'S TRANSCRIPT OF JUVENILE COURT PROCEEDINGS, APRIL 1, 1971.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court.

Department No. 96.

Hon. Marvin A. Freeman, Judge.

In the Matter of Gary Stephen Jones, a person under the age of 21 years. No. 394221.

REPORTER'S TRANSCRIPT
April 1, 1971

APPEARANCES:

For the Minor: Donald W. Pike, 424 S. Beverly Drive, Beverly Hills, Calif. 90212, 553-8533; Kenneth E. Kirkpatrick, Probation Officer, By: S. Canin, Deputy Probation Officer; Helena M. McCrea, CSR, 1601 Eastlake, Los Angeles, Calif. 90033.

LOS ANGELES, CALIFORNIA, THURSDAY, APRIL 1, 1971, 1:45 P.M.

THE COURT: In the matter of Gary Stephen Jones, this is the petition for writ of habeas corpus.

The minor in this matter is represented by conflict counsel appointed under section 700 of the Welfare and Institutions Code.

Although this is an ex parte application, in view of the importance of the issue which has been raised the court will hear oral argument upon the petition, counsel.

[Oral argument of counsel omitted.]

THE COURT: Certainly, the court had before it that time this question although it wasn't pointed up to

the court. So that the issue has inferentially at least been before an Appellate Court and there have been other cases, In Re Breck—

MR. PIKE: Jimmy H., I believe.

THE COURT: And Jimmy H. There have been several cases where the court has at least viewed section 707 and has not seen fit to raise any question about it as indeed it would if it was apparent there was some serious question of construction being placed upon it.

Our procedure of course is not exactly in accordance with 707. We do set the matter for a separate fitness hearing in these cases. Although 707 doesn't talk about a separate fitness hearing, it does however talk about the submission of a report on the "behavioral patterns", which was added. Perhaps it was simply an oversight in the section not to make it clear that you couldn't have the report on "behavioral patterns" unless you set a new and separate hearing. But that is exactly what we do. We set a separate hearing. Despite the fact that 707 as I construe it—and to repeat, I construe that section as giving the Juvenile Court the jurisdiction at any time before the disposition order to order a fitness hearing. In other words, I construe the language "At any time during a hearing" to mean at any time until the disposition order has been made.

Despite the fact, as I say, that this construction of the statute creates the obvious problems you have indicated I don't see how I can read the section as it is written any differently.

Now I am, of course, aware of those problems. I think not only the problems you raise but other problems. Not only do you have the question, if I understand you correctly, as to what is the juvenile to do if

the court has adjudicated the petition, finds the petition sustained. And now between that sustaining of the petition, the completion of the adjudication phase of the hearing and the disposition hearing he now has to decide how he should act and you of course have to advise him how he should act. Should he now act as perhaps he wants to act and tell everything to the probation department, everything about himself and thus create the possibility that instead of there being a disposition hearing there will be a hearing which will start out as a disposition hearing and will end up as an arraignment for a fitness hearing? If he doesn't open up with a probation officer there is of course the danger that the probation officer will find that he is so uncooperative that he cannot make a recommendation for the kind of treatment you think he really should have and, yet, as the attorney worrying about what might happen as the disposition hearing, you have to advise him to continue to more or less stand upon his constitutional right not to incriminate himself in the sense that he makes it likely for the court to set it for a fitness hearing. I see the difficulties you mentioned there.

There is also the difficulty that if in the adjudication hearing his counsel should say "You are fortunate they didn't send you over for a fitness hearing at the detention hearing. You are fortunate you are being tried in juvenile. The best thing for you to do since you are being treated as a juvenile to act as we originally thought a juvenile should act in Juvenile Court, namely, admit everything and that is the best way for you to be given the kind of treatment that you as a juvenile perhaps need." And yet you are afraid to do that because that admission one way or other may end him

up in the adult court where you would want to try the case totally differently.

The second danger of course is not obviated by saying the court should not have the jurisdiction to order a fitness hearing after the petition has been adjudicated because surely the decision to whether or not he should admit would come long before then—sometime before then.

What you are really saying is that even if we construe section 707 narrowly, that the hearing is over once the petition has been sustained, you sometimes have problems as to how to act when at any time the court may decide to call for a fitness hearing. I think that perhaps relates more to the constitutionality of this section than the construction because I think you would agree that the section must be read to at least give the court the right after the hearing has started and before the adjudication to set a fitness hearing for the minor.

Well, as I have said before, I construe the section as I have indicated. I think that is what the legislature meant. I think the legislature may have been thinking in pre-Gaultian terms. It certainly was thinking in pre-Gaultian terms because that was before Gault. It may well be that the legislature would not have enacted this statute after Gault had laid down the guidelines it did or establish the rules it did.

Your second question of course relates to the constitutionality and, again, we discussed this informally before this hearing, counsel, and rather than have you repeat on the record the argument you made then let me say this. We have followed section 707 in the Juvenile Court for a long time. Of course, we do not have a great number of fitness determined. I think that last

year the total number may have been about thirty cases where we found a minor unfit. In previous years it was substantially less. Even though there have not been a great number, we nevertheless have clearly followed the policy of recognizing 707 as giving the court the jurisdiction to set a fitness hearing after the commencement of the introduction of testimony at the adjudication in the Juvenile Court.

For the moment let's ignore the question as whether before or after the adjudication. I do not think it would be proper for me to rule now that this section is unconstitutional. As I say, we have not introduced any substantial evidence regarding the amenability during the adjudication so that we have not unconstitutionally in terms of fairness followed that language, particularly since it is not direct language but merely inferential. But where we have followed this section, previous judges have followed it. Now, since 1961 I would not declare the section unconstitutional insofar as it permits finding of unfitness after the adjudication proceedings have commenced, particularly, as I say, in light of the fact that I believe at least three times appellate courts have seen this section in one light or other and have not made any comment on possible unconstitutionality.

If the United States Supreme Court which has the ultimate responsibility on constitutionality may follow a doctrine of abstention it seems only appropriate that the trial court should follow a doctrine of abstention. I have considerable doubts about the constitutionality.

Let me say that I think that the presentation you made informally and in part here and in your documents, papers, clearly point up a problem in the proper representation of the minor which thus become his

problem in the fairness of the treatment he receives. I think you have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of Gault, again being treated worse than the adult. The fact that it is not double jeopardy, according to appellate cases does in a sense mean that the juvenile is treated worse than an adult. The adult never has to go through these two proceedings.

California Appellate Courts have stated that all that this second trial means is in effect that under certain circumstances we don't give certain juveniles the chance of remaining in Juvenile. Adults never have the chance of being in Juvenile so presumably juveniles cannot object if at least they have a chance and a few of them—if you want to talk in terms of groups—get sent out to the adult court on the individual case. Again, that is Brown, as I recall it. On the individual case I don't recall the exact language but the court with respect to the individual minor pointed up the fact that at most he had an inconvenience by having first been tried in juvenile and then sent over to adult.

In any event, the court reached the result that it was not double jeopardy, and it was pointed out in that case that his rights in the adult court were prejudiced by what happened in the Juvenile Court. I may say in that regard that it has been suggested that the way to solve that problem of the possible impairment of rights in adult court from there having been previous juvenile proceedings is by making the juvenile proceedings confidential and not being able to be used against the minor. I must say that doesn't impress me because if the minor admitted something in the Juvenile Court and named his companions nobody is going to eradicate from the minds of the district attorney or

other people the information they obtained. But even though I have considerable doubts as to how fair it is to have the minor go all the way through or even part of the way through or even just start a juvenile adjudication and then be able to send him over to the adult court I still would not declare the section unconstitutional. It is, I suppose a question of quantum in part.

There is one other thing I wanted to say on that. Of course the fitness hearing itself is a burden upon the minor that adults don't have. But I don't assume the minor can argue with that because I don't assume anybody would say it is unconstitutional to say that certain minors will not have the benefit of the treatment as minors.

Do you have anything to add, counsel?

MR. PIKE: Yes. There is a section, I believe it is 704 which gives the court authority when the court questions the possibility of the minor being amenable to the treatment and facilities available to the juvenile, that they can refer him to the Youth Authority under section 704. The language in that section, as I recall, says after the minor has been found to be a person who comes within section 602—

THE COURT: Yes.

MR. PIKE: As the court pointed out in interpreting the statute, it is peculiar that this statute appears before section 707 instead of after section 707, so that I may be reaching to draw an inference from that statute that the legislature enacted that to take care of the very kind of case we have here today.

THE COURT: As I look through these other sections I don't think the placement could really be of any significance. It is true that the disposition by the

court, 725, is after 707 but there are obviously previous sections. They talk in terms of the procedure to get the disposition hearing. I think the language of 707 is clear enough so that I don't think that the placement would be of any importance at all.

I don't disagree, counsel, as to what would be the better procedure. I have no doubt but that the better procedure is that at the detention hearing, the decision be made as to whether there should be a fitness hearing. At the detention hearing it is clear that the police report may be considered, anything probation introduces may be considered. There is no requirement that evidence be limited to competent evidence, and in the usual case it should be at the detention hearing.

I will go further and say I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, I don't know our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a fitness hearing.

I suppose that now and then a case might come up where at the adjudication hearing facts came out that would make the court realize that at a previous proceeding or hearing or at a previous time there should have been made an order that a fitness hearing be set. I suppose it would be best if we had a law that said that there would be a right upon the showing of evidence which was not before the court at the time of the detention hearing or, in any event, before the adjudication hearing. Perhaps something along those lines.

But we are not writing statutes here now and we are not establishing procedures here. We have only the question before us as to what 707 means. I have indicated the way it has been construed here and the way I intend to continue to construe it until the Appellate Court construes it differently or until it is appealed or amended and, as I have already stated, I will not declare it unconstitutional in light of all of these facts.

If you have nothing further, counsel—Let me add this finally. I think this is an important point though we don't have many cases and those cases where they do come up, there are serious offenses generally involved and minors generally with rather lengthy records or records of rather serious offenses. They are difficult cases. I recognize counsel's problems in these cases and I therefore will on the record now appoint you specially first to represent the minor in the adult court. It is my understanding you are going to ask for a continuance there?

MR. PIKE: That is correct.

THE COURT: And, secondly, to prosecute the appeal in this matter, which you have indicated you are going to take up one way or the other.

MR. PIKE: Thank you.

THE COURT: I will ask that you use clemency upon the county in terms of time expended. You have, I think, the matter very clearly in mind yourself so I think the formulation of the problem will not be difficult for you. There are no factual problems that would cause any difficulty, and I do hope you will be able to receive some help, as you have indicated, from some public law agency or private agency devoted to work in this field.

Also, in line with what I have said to you before, I have ordered the transcript of this proceeding to be prepared immediately. If the record does not indicate I ordered it, I do now order at county expense in view of the fact that the mother is receiving aid now.

MR. PIKE: An original and two, your Honor. The reporter has indicated to me that it would be less expensive if we ordered an original and two copies at this time although unless the writ were granted by whatever appellate court I took it to I would probably only need the original.

THE COURT: I think an original and two is called for. The extra expense is worth it. If nothing happens with this in the appellate court, I can use it as the formulation for some guidelines I will be promulgating in this court.

The petition for writ of habeas corpus is denied for the reasons stated on the record.

MR. PIKE: Thank you very much, your Honor.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

(Certification of court reporter omitted in printing.)

EXHIBIT I—NOTICE OF DENIAL OF STATE HABEAS CORPUS PETITION BY CALIFORNIA SUPREME COURT.

Clerk's Office Supreme Court, 4250 State Building, San Francisco, California 94102, Aug. 4, 1971.

Dear Sir: I have this day filed Order Hearing Denied.

In re: 2 Crim. No. 19956, Jones vs. Habeas Corpus.

Respectfully,

G. E. BISHEL
Clerk

EXHIBIT J—PLEA OF ONCE IN JEOPARDY ENTERED IN LOS ANGELES COUNTY SUPERIOR COURT.

DONALD W. PIKE
424 South Beverly Drive
Beverly Hills, California 90212
879-3611
Attorney for Defendant—Appointed
counsel under Section 987(a) of
the Penal Code

Superior Court of the State of California, County of Los Angeles, Southwest District.

People of the State of California, Plaintiff, vs. Gary Steven Jones, Defendant. No. A 174,204.

Filed Sept. 7, 1971.

ONCE IN JEOPARDY AND
ONCE CONVICTED

The defendant pleads that he has already been placed once in jeopardy and convicted of the offense charged, by the judgment of the Superior Court of the County of Los Angeles, Juvenile Court, rendered at 1601 Eastlake Avenue, Los Angeles, California, in Hearing Room 5, on the 1st day of March, 1971. Attached is a copy of the findings of that court.

/s/ Donald W. Pike
Donald W. Pike

EXHIBIT K—REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING, AUGUST 23, 1971.

In the Municipal Court, South Bay Judicial District, County of Los Angeles, State of California.

Hon. George R. Perkovich, Judge, Division III.

The People of the State of California, Plaintiff. vs. Gary Stephen Jones, Defendant. No. A 174204, Vio. Sec. 211, Penal Code.

REPORTER'S TRANSCRIPT
OF PRELIMINARY HEARING
MONDAY, AUGUST 23, 1971

APPEARANCES:

For the People: Nikola M. Milulcich, Esq., Deputy District Attorney.

For the Defendant: Donald W. Pike, Esq., 424 South Beverly Drive, Beverly Hills, California.

Reported by: Sandra B. Pister, CSR.

TORRANCE, CALIFORNIA: MONDAY,
AUGUST 23, 1971; 11:00 A.M.

THE COURT: People vs. Jones.

MR. MILULCICH: The People call James Thomas Mattera.

MR. PIKE: Before calling the witness to the stand, I would like to enter a plea of once in jeopardy and once convicted and I have that plea with me in writing.

THE COURT: Please show it to the District Attorney.

Have you been apprised of it?

MR. MILULCICH: No, your Honor.

MR. PIKE: The matter has been to the Court of Appeals. It was rejected there. A writ of habeas corpus.

MR. MILULCICH: The defendant was certified as an adult from the juvenile court and this is the basis of counsel's motion that he has, in fact, been in jeopardy.

THE COURT: Has that issue been tried on the writ of habeas corpus?

MR. PIKE: That is correct. We are in the court of the State of California, but in order to preserve the record I again raise the plea and I would like to file a written plea.

THE COURT: All right.

MR. PIKE: It has been attached to a certified copy of the court's ruling in the juvenile court of which this matter was previously tried.

MR. MILULCICH: If I am not mistaken, the procedure would be for the defendant, in effect, to withdraw his plea of guilty if there has been one.

THE COURT: There hasn't been any plea entered.

Let's go off the record.

(Whereupon a discussion was held off the record.)

THE COURT: Back on the record. On the same questions of facts, then the plea is rejected, proceed with the preliminary hearing.

JAMES THOMAS MATTERA,

called as a witness by and on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: James Thomas Mattera.

DIRECT EXAMINATION

BY MR. MILULCICH:

Q Where do you live?

A 4030 West 164th Street.

Q And is your telephone number there 370-3002?

A Yes.

Q Where do you work?

A I work at the Lawndale Liquor Store, 16201 Hawthorne Boulevard in the City of Lawndale.

Q Were you working at that location on or before February, 1971?

A Yes, I was.

Q At approximately 10:45 p.m., did something unusual occur?

A Yes. I was robbed.

MR. PIKE: Move that be stricken as a conclusion of the witness.

THE COURT: It will be stricken.

Tell us what happened, what you observed and what you saw.

THE WITNESS: Well, I was working. One customer was at the counter and two people came in and walked in the back of the store and waited until I finished with this customer, and they came up with a ten cent bag of potato chips and they pulled guns and said, "Back up against the wall."

BY MR. MILULCICH:

Q Either one of those persons in the courtroom today?

A Yes, he is.

Q Point him out, please.

A The guy on the left.

THE COURT: Indicating the defendant.

BY MR. MILULCICH:

Q What happened after the guns were pulled?

A He said, "Back against the wall," and I did, and he, the defendant or the guy right there, reached up and picked up the whole cash box and handed it over to the other guy.

Q And then what happened?

A And then I told him—I asked him if he would leave the box and he said that he didn't have time and he stayed in the front.

THE COURT: Which one is the one in the front, the defendant?

THE WITNESS: The defendant stayed while the other person walked out and he followed him.

THE COURT: And then they left?

THE WITNESS: Right.

MR. MILULCICH: I have what appears to be a shopping bag along with some number attached thereto.

May I have these items marked as People's 1 for identification?

THE COURT: It may be so marked.

MR. MILULCICH: May I approach the witness?

THE COURT: You may.

MR. MILULCICH: May the record reflect I am now opening this bag and exposing the contents therein which appears to be a box or a cash register and two guns and I am showing them to the witness.

Sir, I show you these items presently before you previously marked as People's 1 for identification.

Do these items appear at all familiar to you?

A This looks like the box.

THE COURT: Indicating the cash drawer?

THE WITNESS: That looks like one of the guns.

THE COURT: Referring to a .38 Smith and Wesson with a short barrel, one inch barrel, apparently.

Do you see the other gun there?

THE WITNESS: Yes.

THE COURT: Do you recall seeing that before?

THE WITNESS: I just remember the brown handle.

THE COURT: Where did you see this one, the one inch Smith and Wesson with the brown handle?

THE WITNESS: I couldn't state positively which person had it. I just know that one had a brown handle and one of those two persons had it.

BY MR. MILULCICH:

Q I show you what appears to be kind of a blue wool-type cap that I have removed from People's 1 for identification.

I ask you to look at that and tell me if that appears at all familiar to you.

A At the time both of them had one on.

Q They had this type of a cap on?

A Yes, they tucked it up.

MR. MILULCICH: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. PIKE:

Q Mr. Mattera, that brown handled gun, the only thing you recognize is that it has a brown handle; is that correct?

A Yes.

Q Are there any marks on the cash drawer that is before you that was contained in People's 1 that helps you identify the cash drawer that came from your store?

A No.

THE COURT: IT just looks like it; it resembles it?

THE WITNESS: Yes.

BY MR. PIKE:

Q Prior to your testifying here today, on how many occasions after the event that you have testified to on February the 8th or between February the 8th and today, how many times have you seen the defendant?

A I really couldn't say. I have seen him because I had to go downtown—

THE COURT: How many times between the date of this incident at the liquor store and today, how many times, if you can remember seeing him?

THE WITNESS: I know for sure at least once.

THE COURT: At least once?

THE WITNESS: Yes.

BY MR. PIKE:

Q Didn't you see a photograph of this defendant?

A The day after.

Q Where was that that you saw the photograph?

A I was at the store and the two detectives or police officers came in with the pictures.

Q How many pictures did the detectives have for you?

A I couldn't tell; it was more than one.

Q More than three?

A Yes, there was.

Q How many pictures did you recognize that were in that group that was brought to you?

A One.

Q And were all of those pictures of black men?

A Yes, they were.

Q They were all mug shots; that would be a profile and a name would appear? It would be an official photograph taken by the police.

A I can't remember.

Q You testified you saw this defendant at one other time. Where was it that you saw him?

A It was downtown in some court. I got subpenaed.

Q It was in a court?

A Yes.

Q Did you testify in that court?

A Yes, I did.

Q Did you identify the defendant in that court?

A Yes, I did.

Q Do you know what the outcome of that appearance in court was?

A No, I don't.

Q Were you excluded from the courtroom during the time the testimony was taken?

A As I gave my testimony.

Q Prior to the time you gave your testimony were you excluded when anyone else gave their testimony?

A Yes, I think so.

MR. PIKE: No further questions.

THE COURT: Anything further?

You may stand down.

MR. MILULCICH: The People call Officer Gomez.

THE COURT: You are going to put on the full-blown case?

MR. MILULCICH: No, your Honor.

FRANKLIN GOMEZ,

called as a witness by and on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your full name, please.

THE WITNESS: Franklin Gomez. G-o-m-e-z.

DIRECT EXAMINATION

BY MR. MILULCICH:

Q Deputy Gomez, what is your present occupation and assignment?

A Deputy Sheriff for the County of Los Angeles, currently assigned to Administrative Services.

Q Were you so employed and so assigned on February 8, 1971?

A Yes, I was.

Q Did you have—did you have occasion to receive a call over your police radio unit as to an armed robbery?

A Yes, I did.

Q What information was given to you?

A The information was there was an armed robbery at 16201 Hawthorne Boulevard, the Lawndale Liquor Store perpetrated by two male Negroes with a third suspect driving the car that the suspects left in.

The vehicle was described as a possible 1960 to 1963 General Motors product, either an Oldsmobile or a Pontiac, brown-and-white in color. That one of the taillights was inoperative.

Q Did you subsequently observe a vehicle matching this description?

A Yes, I did.

Q Where was it?

A The vehicle was eastbound on El Segundo Boulevard approaching Central Avenue.

Q Approximately what time was that?

A Approximately 23:10 or 11:10.

Q Did you happen to stop that vehicle?

A Yes, we did.

Q Did you observe anything inside this vehicle?

A Yes.

Q Drawing your attention to the items previously marked People's 1 for identification, I ask you to look at them and tell me if you can recognize any of those items?

A Yes, I do.

Q Which items do you recognize and can you tell us where you first saw them.

A I recognize all of the items, the cash box with the guns. There was also some currency and change and the caps were found in the front seat on the floorboard between the front passenger's seat.

Q Do you recognize any person that was in the vehicle at the time you stopped them?

A Yes, I do.

Q Is that person in the courtroom?

A Yes.

Q Will you point him out?

A Yes. He is the person sitting at my far left.

THE COURT: Indicating the defendant.

BY MR. MILULCICH:

Q Where was he seated when you first observed this vehicle?

A He was in the right, rear passenger seat.

MR. MILULCICH: Thank you. Nothing further.

MR. PIKE: No further questions.

THE COURT: You may stand down.

MR. MILULCICH: At this time the People offer People's 1 for identification into evidence.

MR. PIKE: No objection.

THE COURT: Any defense at this time?

MR. PIKE: No, your Honor.

THE COURT: It appearing to me that the offense in the within complaint mentioned to wit, violation of Section 211 of the Penal Code, robbery, a felony, was committed and there is sufficient cause to believe that the within named defendant committed the same. That he will be held to answer to the same. That he appear for arraignment in Torrance Southwest J on September 7, 1971, at 9:00 a.m.

Bail to stand in the amount heretofore fixed.

[Certification of reporter omitted in printing].

EXHIBIT L—INFORMATION.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. Gary Stephen Jones, Defendant. No. A-174204. Robbery (Sec. 211 P.C.).

INFORMATION

The said Gary Stephen Jones is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Robbery, in violation of Section 211, Penal Code of California, a felony, committed as follows: that the said Gary Stephen Jones on or about the 8th day of February, 1971, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of James Thomas Mattera.

That at the time of the commission of the above offense, said defendant, Gary Stephen Jones, was armed with a deadly weapon, to wit, a pistol.

JOSEPH P. BUSCH, JR.
District Attorney for the County of
Los Angeles, State of California

By JOHN M PROVENZANO, Deputy

EXHIBIT M—SUPERIOR COURT MINUTE ORDER, SEPTEMBER 29, 1971.

Superior Court of California, County of Los Angeles. Dept. SWJ.

Date: Sept. 29, 1971.

Honorable: Auten F. Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California vs. Jones, Gary Stephen. 603 C A 174204.

Counsel for Plaintiff: Joseph P. Busch, Jr., by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Trial (Submission on Transcript) Trans from SW F.

The defendant personally and all counsel waive trial by jury.

Cause Called for Trial.

By stipulation of defendant and all counsel cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this court's rulings. The defendant personally waives his right to confrontation

of witnesses for the purpose of further cross-examination.

The Court states it has read and considered the transcript of the preliminary hearing.

Argument waived, cause submitted.

The Court finds the defendant guilty as charged to 211 P.C., degree fixed as first.

Defendant waives time for sentence. Referred to probation department and further proceedings continued to 10-20-71 in Dept. SWJ at 9 A.M.

Remanded.

EXHIBIT N—SUPERIOR COURT MINUTE ORDER, OCTOBER 20, 1971.

Superior Court of California, County of Los Angeles. Dept. SWJ.

Date: October 20, 1971.

Honorable: Auten Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California, vs. Jones, Gary Stephen. A174204. X-511939.

Counsel for Plaintiff: Joseph P. Busch, Jr., District Atty. by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Probation and Sentence.

Probation denied. Sentenced as shown below.

Committed to the California Youth Authority.

Remanded.

EXHIBIT O—SUPERIOR COURT JUDGMENT OF CONVICTION AND COMMITMENT TO YOUTH AUTHORITY.

Superior Court of the State of California, for the County of Los Angeles. Dept. Southwest J.

Date: October 20, 1971.

Honorable: Auten Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California vs. Jones, Gary Stephen. A174204. X-511939.

Counsel for Plaintiff: Joseph P. Busch, Jr., District Atty., by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Probation and Sentence.
Probation is denied.

Whereas the said defendant having been duly found guilty of the crime of Robbery (Sec. 211. P.C.), a felony, as charged in the information, which the Court found to be Robbery of the first degree committed in Los Angeles County, on or about the 8th day of February, 1971 and it appearing that the defendant was under the age of 21 years at the time of apprehension on the 8th day of February, 1971, to-wit: the age of seventeen (17) years, born on the 22nd day of June, 1953.

It Is Therefore Ordered, Adjudged and Decreed that said defendant be committed to the Youth Authority of the State of California for the term prescribed by law.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of Los Angeles County to be held in custody in the County Jail under the jurisdiction of the Youth Authority of the State of California, subject to any orders the Authority may issue.

This Minute Order Was Entered
Oct. 21, 1971

WILLIAM G. SHARP, County Clerk
and Clerk of the Superior Court.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS.

DONALD W. PIKE

424 South Beverly Drive
Beverly Hills, California
90212
Tel: (213) 553-8533

PETER BULL

ROBERT L. WALKER
Youth Law Center
795 Turk Street
San Francisco, California 94102
Tel: (415) 474-5865
Attorneys for Petitioner

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

Filed: Dec. 10, 1971.

POINTS AND AUTHORITIES
IN SUPPORT OF RELATOR'S
PETITION FOR A WRIT OF
HABEAS CORPUS

TABLE OF CONTENTS

I. INTRODUCTION AND STATEMENT OF FACTS.

It is scarcely possible to imagine a procedure more directly at odds with the clear language and fundamental policies of the double jeopardy clause than that to which Gary Steven Jones has been subjected. On March 1, 1971 he was adjudicated by the Juvenile Court of Los Angeles County to be a person described by Section 602 of the California Welfare and Institutions Code [hereinafter cited as "Cal. W&I Code"]. This determination was reached after the juvenile court

referee heard testimony, including testimony of the minor, and the court explicitly sustained the petition [the findings and order of Referee Barnett are annexed to relator's petition as Exhibit "E"].[1]

Instead of holding a dispositional hearing the court held a hearing pursuant to Cal. W&I Code § 707 to determine if the minor would be "amenable to the care, treatment and training program available through the facilities of the juvenile court. . . ."[2] The court found that the minor was not a proper subject for treatment under the Juvenile Court Law and directed that he be tried again in adult court.

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[1]Proceedings under the Juvenile Court Law are bifurcated. Since there are no provisions for bail, the juvenile court is required to hold a detention hearing within one judicial day after a petition is filed. The purpose of the hearing is to determine whether the minor should be detained or released pending his jurisdictional hearing. Cal. W&I Code §§ 632, 635, 636. With the exception of the minor's right to a jury trial, the jurisdictional hearing is identical to a criminal trial [*In re Winship*, 397 U.S. 358 (1970)]. The purpose of the proceeding is for the juvenile court to determine if the minor has committed the act or acts which allegedly bring him within the jurisdiction of the juvenile court. Cal. W&I Code § 701.

If the juvenile court finds that the minor is a person described by Section 602 of the Cal. W&I Code, it will hold a dispositional hearing which serves the same function as a sentencing proceeding in a criminal case. This hearing will normally be held a number of days after the jurisdictional hearing so that the probation officer will have sufficient time to provide the court with an up-to-date social studies report. Cal. W&I Code, § 702. Dispositional alternatives include varying kinds of probation, commitment to a juvenile home, ranch, or camp, or commitment to the California Youth Authority. Cal. W&I Code §§ 727, 730, 731.

[2]In its entirety Cal. W&I Code § 707 provides:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amen-

Petitioner was subsequently tried in connection with the identical incident for which he had been found a person coming within the Juvenile Court Law. He was convicted of having committed armed robbery in violation of Cal. Penal Code § 211 and committed to the California Youth Authority.[3] At each stage of the proceedings petitioner's court-appointed counsel has scrupulously objected that the procedure outlined above constituted double jeopardy in violation of the minor's constitutional rights.

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able to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

The Court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

[3]The minute orders of the Superior Court have been annexed to relator's petition as Exhibits "M" and "N".

II. PETITIONER WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner has been compelled to undergo two trials, one in juvenile court and one in adult court, based upon the same underlying incident. During each proceeding he was "in jeopardy" because an unfavorable adjudication would subject him to loss of liberty for an extended period of time. See Cal. W&I Code §§ 727, 731; Cal. Penal Code § 213; see *In re Gault*, 387 U.S. 1 (1967). If petitioner had been tried twice as an adult based upon the same underlying facts, no one would dispute that he was being placed in double jeopardy.[4] See, *e.g., Benton v. Maryland*, 395 U.S. 784 (1969), which held that the double jeopardy guarantee is enforceable against the states through the Fourteenth Amendment. Yet, merely because the initial proceeding was conducted in juvenile court, the state courts have sustained this anomalous procedure without, however, articulating a defensible rationale. In fact, Judge Freeman, the Presiding Judge of the Los Angeles Juvenile Court, revealed his personal doubts regarding its constitutionality, although he felt compelled by California appellate decisions to deny petitioner's writ.

> "I have considerable doubts about the constitutionality. . . . I think you [counsel] have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of *Gault*, again being treated worse than the adult. The fact that it is not double jeopardy according to appel-

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[4]We assume of course, that there was no reversal on appeal or other contingency not applicable here.

late cases does in a sense mean that the juvenile is treated worse than an adult. The adult never has to go through these two proceedings."[5]

It is well-established that jeopardy attaches in a non-jury trial no later than when the first witness is sworn. *United States v. Jorn*, 27 L.Ed.2d 543 (1971); *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Richard M. v. Superior Court*, 4 Cal. 3d 370, 93 Cal. 752 (1971). On the other hand, Cal. W&I Code § 707 authorizes the transfer of a case from juvenile court to adult court, and the commencement of criminal proceedings at any time during the jurisdictional hearing.[6] Since this statute authorizes a second prosecution for the same underlying offense after jeopardy has already attached at the initial proceeding, it is in fatal conflict with the constitutional prohibition against twice placing a person in jeopardy. This procedure, sanctioned by Cal. W&I Code § 707 and utilized in the present case, is precisely the type of practice which the double jeopardy guarantee was intended to prevent. See *United States v. Ball*, 163 U.S. 662, 669 (1896); *Ex Parte Lange*, 18 Wall. 163, 21 L.Ed. 872, 877 (1874); *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959).[7]

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[5]Reporter's Transcript, April 1, 1971, p. 15 [Exhibit "H"].

[6]See footnote 2; *supra*.

[7]The constitutionality of Cal. W&I Code § 707 is ripe for decision before this Court. The California Court of Appeal specifically upheld the constitutionality of the procedure encompassed by Section 707 in denying the writ below. *In re Gary Steven J.*, 17 Cal. App. 3d 704 at 709-10. Although the Supreme Court of California's denial of a hearing does not indicate agreement with all of the reasoning contained in the intermediate appellate court's opinion, it may "be taken as an approval of the conclusion there reached." See *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450, 453 n.3 (1955); *DiGenova v. State Board of Education*, 57 Cal.2d 167, 367 P.2d 865 (1962). Therefore, both an intermediate appellate court and the highest court in California have either explicitly or implicitly upheld Cal. W&I Code § 707 against a constitutional attack.

The purpose underlying the double jeopardy clause is to prevent the State, with all of its resources and power, from making repeated attempts to convict an individual. The double jeopardy clause is intended to protect the individual from the anxiety, embarrassment, expense, and ordeal of a second trial. *Green v. United States,* 355 U.S. 184, 188 (1957). In language particularly appropriate to the case at bar, the Supreme Court has stated,

> "The protection is not, as the court below held, against the peril of second punishment but against being tried twice for the same offense." *Kepner v. United States,* 195 U.S. 100, 130 (1904).

Trial of Gary in adult court upon the identical facts already adjudicated in juvenile court is clearly barred by this principle. It is constitutionally immaterial whether either or both adjudications resulted in conviction or acquittal.

> ". . . the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *United States v. Ball,* 163 U.S. 662, 669 (1896). Accord, *Helvering v. Mitchell,* 303 U.S. 391, 398 (1938); *In re Nielson,* 131 U.S. 176 (1889); *Richard M. v. Superior Court,* 4 Cal. 3d 370, 376; 93 Cal. Rptr. 752, 756 (1971).[8]

There is one federal district court decision which squarely examined the procedure before this Court and found it to be constitutionally inadequate. *United States v. Dickerson,* 168 F. Supp. 889 (D.D.C. 1958), *re-*

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[8]"The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, *whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.*" (Emphasis supplied.) *Ex Parte Lange,* 18 Wall. 163, 21 L.Ed. 872, 877 (1874).

versed on other grounds, 271 F.2d 487 (D.C. Cir. 1959). In *Dickerson* a minor entered a guilty plea in juvenile court and was found by the court to be a delinquent child. As in the present case, the Juvenile Court attempted to transfer jurisdiction to the adult court after the jurisdictional hearing had terminated. Since jeopardy had attached, the court held that waiver of jurisdiction was impermissible.

> "This result in no way interferes with the statutory authority of the Juvenile Court to waive jurisdiction to the District Court in certain cases. The waiver of jurisdiction, however, must take place before jeopardy attaches. It may be exercised either after a preliminary hearing, or after an *ex parte* investigation, but may not occur after the defendant has pleaded guilty and his plea was accepted, or after the case has been tried or the trial has been started in Juvenile Court. The mere fact that different terminology is used in the Juvenile Court in a commendable and humane effort to disassociate its activities from the atmosphere of a criminal tribunal does not affect these conclusions. We must not be misled by names or terms, but must be guided by juristic concepts to which the names or terms are attached. *Id.* at 903.[9]

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[9]The Court of Appeals for the District of Columbia Circuit overruled this decision in part because, in its view, the District Court had erred in applying procedural safeguards observed in criminal proceedings to the juvenile court. This basis of the court's reversal would appear to be impliedly overruled by *In re Winship,* 397 U.S. 358 (1970); and *In re Gault,* 387 U.S. 1 (1967). In addition, the Court of Appeals felt that in waiving the minor to adult court, the juvenile court judge had implicitly rejected his guilty plea [*United States v. Dickerson,* 271 F.2d 487, n. 9 at 491 (1959)], a ground clearly not pertinent to the present case.

The facts in *Dickerson* are identical to the case at bar except for the insignificant difference that Gary was adjudicated a delinquent after a jurisdictional hearing, whereas Dickerson had entered a plea of guilty. Since jeopardy had attached in both cases, subsequent prosecution of either minor for the same offense for which he had previously been found a delinquent child would be barred.

The California Court of Appeal, Second Appellate District, rejected petitioner's double jeopardy argument below in an opinion in which the Court commented,

> ". . . while it is true that . . . jeopardy had attached once the first witness had testified at the 701 [jurisdictional] hearing, no new jeopardy had arisen by the proceeding sending the case to the criminal court. The entire juvenile court law contemplates a careful determination, on a case-by-case basis (citations omitted), as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some circumstances, a minor will go from criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved." 17 Cal.App.3d 704 at 710; Appendix "C".

This reasoning, we submit, reflects an attitude towards juvenile court proceedings which the Supreme Court decisively repudiated in *In re Winship,* 397 U.S. 358 (1970), when it said,

> ". . . civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court . . ." *Id.* at 366.

If the protection afforded by the double jeopardy clause of the Fifth Amendment is applicable to juvenile proceedings—and this was the assumption of the California Court of Appeal—it is beside the point either that the juvenile court is seeking to rehabilitate those minors falling within its jurisdiction or that Cal. W&I Code § 707 provides a mechanism by which the court transfers those minors over age 16 whom it believes it cannot rehabilitate to adult court.

The immutable fact remains that under Cal. W&I Code § 707 minors like Gary Steven Jones are compelled to undergo two trials for the same offense. It is patently erroneous to perceive the jurisdictional hearing in juvenile court, as did the Court of Appeal, as merely prefatory to the later criminal proceeding.[10] Under Cal. W&I Code § 602 the jurisdictional hearing is a fullblown trial at which the district attorney must establish beyond a reasonable doubt [*In re Winship*, 397 U.S. 358 (1970)] the minor's guilt. The sole issue before the juvenile court during the jurisdictional hearing was whether the district attorney had established that Gary had committed a robbery under Cal. Penal Code § 211. The court's jurisdictional finding exposed Gary to institutionalization until age 21 [Cal. W&I Code § 607], and at no time during the jurisdictional hearing was Gary's suitability for treatment be-

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[10]There is no requirement under the Juvenile Court Law by which the jurisdictional hearing must precede the Section 707 [transfer of jurisdiction] hearing. The two factors which the juvenile court *must* consider in determining whether to waive jurisdiction are the minor's past record of delinquency and his behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court*, 3 Cal.3d 709, 714; 91 Cal.Rptr. 600 (1970). These two factors may obviously be explored at a hearing conducted prior to the time jeopardy attaches at the jurisdictional hearing.

fore the Court. Unless benign motives and *post hoc* reasoning are to overshadow reality, the constitutional prohibition cannot be avoided merely because of the label affixed to the proceeding.

> "Precise constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings." *United States v. Dickerson,* 168 F.Supp. 899, 902 (D.D.C. 1958), *rev'd. on other grounds,* 271 F.2d 487 (D.C.Cir. 1959).

Nor may the double jeopardy protection be applied with any less vigor because the two proceedings which the minor is forced to endure will take place in different courts. This is the "dual sovereignty" theory under which double prosecutions for the same offense in state and local courts were formerly permitted. This fictional basis for duplicate prosecutions was laid to rest in *Waller v. Florida,* 397 U.S. 387, 440 (1970), where the Court held,

> ". . . a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy . . ."

Although we believe that Cal. W&I Code § 707 is unconstitutional, we are not asserting that California is powerless to provide a procedure by which the most incorrigible juveniles may be transferred to adult court for prosecution. The question is not whether a determination to waive a minor to adult court should ever be made, but merely *when* it is to be made. There is no reason to believe that in most cases such a determination could not be reached at the detention hearing or at a special waiver hearing conducted prior to the inception of the adjudicatory proceeding. As the presid-

ing Judge of the Los Angeles Juvenile Court noted in denying relator's petition for a writ of habeas corpus,

> ". . . I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, I don't know our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a fitness hearing." (RT 18).[11]

Unlike Cal. W&I Code section 707, recent draft and model statutes have stressed that a determination to transfer a juvenile to adult court must be made prior to the commencement of adjudicatory proceedings. Thus, Section 34(a) of the third tentative draft [May, 1968] of the Uniform Juvenile Court Act, prepared by the American Bar Association National Institute provides:

> "After a petition has been filed charging delinquency based on conduct which is designated a public offense under the laws, including local ordinances, of this state, the court may, *before hearing the petition on its merits,* transfer the offense for criminal prosecution to the appropriate court having jurisdiction of the offense. . . ." (Emphasis supplied.) See also Rule 9, *Model Rules of Juvenile Courts* (N.C.C.D. 1968).

As these commentators have made clear, contemporary constitutional standards demand that the waiver decision be reached before jeopardy has attached at the jurisdictional hearing.

A different rule would have the impermissible effect of creating divergent double jeopardy standards for

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[11]Exhibit "H", p. 18.

adults and juveniles. There is no constitutional justification for holding that jeopardy attaches in adult proceedings when the first witness is sworn [*United States v. Jorn*, 27 L.Ed.2d 543 (1971)], while concomitantly holding that a minor who has testified in a juvenile proceeding and who has been adjudicated a delinquent, is not placed in double jeopardy at his subsequent criminal trial for the same underlying offense. Since this is what transpired in the present case, this Court must reject the conclusion of the California Court of Appeal and hold that petitioner has been twice placed in jeopardy in violation of his rights under the Fifth Amendment.

III. THE GUARANTEE AGAINST TWICE BEING PLACED IN JEOPARDY AFFORDED BY THE FEDERAL CONSTITUTION IS APPLICABLE TO JUVENILE DELINQUENCY PROCEEDINGS.

This writ presents an issue of first impression in this Court and in the Ninth Circuit—whether the protection afforded by the double jeopardy clause of the Fifth Amendment is applicable to proceedings in juvenile court under California W&I Code Section 602. If, as petitioner contends, the double jeopardy clause does apply to delinquency proceedings, petitioner was placed in jeopardy during the jurisdictional hearing in juvenile court, and his subsequent prosecution in adult court was unlawful.

The Supreme Court of California has recently confronted this issue and held that the double jeopardy provisions of both federal and state Constitutions are applicable to proceedings under Section 602 of the Juvenile Court Law. *Richard M. v. Superior Court*, 4

Cal.3d 370, 93 Cal.Rptr. 752 (1971). There is a scarcity of other authority on this issue, but such authority as does exist supports the proposition that minors in juvenile delinquency proceedings are protected by the double jeopardy clause. *United States v. Dickerson*, 168 F.Supp. 899, 902 (D.D.C. 1958); *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959); *Tolliver v. Judges of the Family Court*, 59 Misc.2d 104 (N.Y. Fam.Ct. 1969); *Anonymous v. Superior Court*, 10 Ariz. App. 956, 959; 457 P.2d 956 (1969) [". . . we accept, without deciding, that in this post-*Gault* era, the Double Jeopardy clause applies to juvenile proceedings . . ."]; *In re Holmes*, 379 Pa. 599, 109 A.2d 523, 526 (S.Ct. of Pa. 1954) (dictum). A number of state and federal court decisions in Texas have held that it is a deprivation of fundamental fairness and due process of law to convict a defendant in adult court based upon the same act for which he had been adjudged a delinquent in juvenile court. *Hutlin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Sawyer v. Hauck*, 245 F.Supp. 55 (W.D.Tex. 1965); *Garza v. State*, 369 S.W.2d 36 (Tex.Cr.App. 1963). Although these decisions were founded upon the due process clause of the Fourteenth Amendment, rather than the double jeopardy clause of the Fifth Amendment, it must be recalled that under *Palko v. Connecticut*, 302 U.S. 319 (1937), the double jeopardy clause was not considered to be applicable against the states. These cases were decided under the *Palko* rule which was not overturned as regards the double jeopardy prohibition until the Supreme Court decided *Benton v. Maryland*, 395 U.S. 785 (1969).

Nevertheless, in *Collins v. State*, 429 S.W. 2d 650 (Tex.Civ.App. 1968), the court foreshadowed Benton in holding that a second juvenile court proceeding on

the same facts was barred on double jeopardy grounds, despite a previous nonsuit. In view of this decision, it seems likely that previous decisions by federal and state tribunals in Texas have been heavily based upon notions of double jeopardy, although at that time, the courts chose due process as the purported basis for their decisions because they considered themselves bound by *Palko*.

The language of the double jeopardy clause applies to all persons without exception; it draws no distinctions between adults and minors:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."
>
> U.S. Const., Amend. V.

The plea of *autrefois convict* was known at early common law[12] and is one of the most deeply ingrained in our Anglo-American system of jurisprudence. *Green v. United States*, 355 U.S. 184, 188 (1957). So firmly entrenched is this principle that every state constitution contains a provision prohibiting double jeopardy. Sigler, *Double Jeopardy*, 34 (1969). Indicative of the importance attached to this protection is the fact that the Supreme Court has ruled that its decision in *Benton v. Maryland*, 395 U.S. 784 (1969), making the double jeopardy clause enforceable against the states, is fully retroactive. *Ashe v. Swenson*, 397 U.S. 436, 437, fn. 1 (1970). In view of the importance attached to this monumental bulwark of liberty, it would indeed be

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[12] ". . . the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be . . . is a good plea in bar to an indictment." *Blackstone's Commentaries*, Vol. II, Section 379, p. 2571 (Jones Ed. 1916).

surprising if the protection it affords were available to hardened criminals but not to children. Compare *In re Gault*, 387 U.S. 1, 47 (1967).

In several decisions the United States Supreme Court has applied various provisions of the Bill or Rights to juvenile delinquency proceedings. The Court has held that a minor at such a proceeding is entitled to adequate notice of the charges against him, representation by counsel, the right not to incriminate himself, and the right to confront and cross-examine witnesses [*In re Gault*, 387 U.S. 1 (1967)], as well as the right to be tried in accordance with a reasonable doubt standard of proof [*In re Winship*, 397 U.S. 358 (1970)]. In an earlier decision the Court had held that in a transfer of jurisdiction hearing such as the one in the present case, the minor is entitled to a hearing, representation by counsel, and a statement of reasons or considerations; and counsel is entitled to review the child's social studies records. *Kent v. United States*, 383 U.S. 541 (1966).[18]

The principle which emerges from these decisions is that in the absence of strong, contervailing considerations the provisions of the Bill of Rights will be applied to delinquency proceedings in juvenile court. In *Winship* particularly the Court placed the burden on the state to demonstrate that the application of criminal safeguards would harm particular beneficial aspects of

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[18]Counsel was already required under a District of Columbia statute. Although it is by no means clear, the requirements of some kind of hearing and findings of fact seem to have rested upon a due process foundation. See especially 383 U.S. at 561. The Supreme Court of California has read *Kent* to be a constitutional ruling insofar as it requires appointment of counsel at transfer of jurisdiction hearings. *In re Harris*, 67 Cal.2d 76, 64 Cal.Rptr. 319, 321 (1967).

the juvenile judicial process. See The *Supreme Court, 1969 Term,* 84 Harv.L.Rev. 1, 160 (1969). Bill of Rights safeguards which are not inconsistent with the philosophy and practices of the juvenile court will be required because a minor in a delinquency proceeding will be "subjected to the loss of his liberty for years" and because such a proceeding is "comparable in seriousness to a felony prosecution." *In re Gault,* 387 U.S. 1 at 33 (1967).

Last term the Court held that minors in delinquency proceedings do not possess a federal, constitutional right to a trial by jury. *McKiever v. Pennsylvania,* .... U.S. ...., 29 L.Ed.2d 647 (1971). Although the result was different, this decision was no more than an application of those principles already adumbrated in *Kent, Gault,* and *Winship, supra.* The Court found that imposition of the jury trial requirement would destroy this distinctive quality of the juvenile court system.

> "If the jury trial were to be injected into the juvenile court system, it would bring with it into that system the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial." 29 L.Ed.2d at 663.

Unlike the jury trial requirement, application of the double jeopardy safeguard would not radically affect the juvenile court process. In fact, it would not affect at all the *nature* of either the jurisdictional hearing, or the waiver of jurisdiction hearing under Cal. W&I Code Section 707. The sole difference would be that the juvenile court would be required to hold a Section 707 hearing prior to the time that jeopardy attached at the jurisdictional hearing, a result which is recommended in both the Uniform Juvenile Court Act and the National Council on Crime and Delinquency's *Model Rules*

for Juvenile Court,[14] and which the Presiding Judge of the Los Angeles Juvenile Court has indicated would not hamper his Court's operation.[15]

Imposition of the double jeopardy guarantee is fully in keeping with the philosophy and practices of the juvenile court. It will not increase the formality of the process or introduce unnecessary delays. Quite to the contrary, it will expedite the time when a decision must be made as to whether a minor will be dealt with as a juvenile or transferred to adult court, thereby relieving some of the anxiety which is both counterproductive to rehabilitation of the minor and which the double jeopardy clause is intended to prevent. See *Green v. United States,* 355 U.S. 184, 187-88 (1957).

By contrast, it is fundamentally unfair to expose the minor to a jurisdictional hearing when he does not know if he later will be subjected to a criminal prosecution for the same underlying offense. In this situation, it is impossible for counsel to reach an intelligent decision as to whether his client should testify, not knowing whether his client's testimony might later be used against him at the criminal trial. The present procedure turns every jurisdictional hearing into a potential preliminary hearing and deprives the juvenile court in many instances of the opportunity of hearing the minor's side of the case. Thus, the double jeopardy guarantee would actually be in keeping with the juvenile court's rehabilitative goal and help the court to effectuate its aim.[16]

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[14]See p. 13, *supra.*

[15]P. 12-13 *supra;* Exhibit "H" Appendix p. 62.

[16]Since the purpose of a Cal. W&I Code Section 707 hearing is to transfer jurisdiction to adult court for criminal prosecution, even more of the criminal safeguards should be available than at a juvenile court jurisdictional hearing.

In fact, the patent unfairness of exposing the minor to this uncertainty may destroy any realistic possibility for his rehabilitation. See *In re Gault,* 387 U.S. 1, 33 (1967), and articles and reports cited therein. It does not auger well for a system of juvenile justice to claim an exemption from a constitutional provision that would protect a juvenile from the anxiety and actuality of multiple prosecutions for the same underlying offense. The rehabilitative goals of the juvenile court process are neither consistent with nor enhanced by a method of proceeding deemed so basically repugnant when applied to adults.

IV. HABEAS CORPUS IS THE PROPER REMEDY.

Habeas corpus is the proper remedy by which one who is incarcerated may challenge the legality of the judgment pursuant to which he is confined. 28 U.S.C. Section 2241. Therefore, Gary Steven Jones may challenge by a writ of habeas corpus the lawfulness of the Superior Court judgment convicting him of robbery in the first degree and sentencing him to the California Youth Authority. If, as petitioner contends, he was twice placed in jeopardy by the juvenile court adjudication and adult court prosecution, his present confinement is illegal and he is entitled to be released and remanded to juvenile court. See *Peyton v. Rowe,* 391 U.S. 54 (1968), where one of the claims petitioners was permitted to raise by a petition for a writ of habeas corpus was that he had been twice placed in jeopardy for the same offense.

It makes no material difference that if this Court orders petitioner released from his present confinement, the Juvenile Court of Los Angeles County may subsequently restrain him of his liberty. *In re Bonner,*

151 U.S. 242 (1894) [habeas corpus lies to obtain petitioner's release from the prison to which he had been unlawfully sentenced without prejudice to his being sentenced to the appropriate prison]; *Velasquez v. Rhay*, 408 F.2d 9 (9th Cir. 1969) (per curiam); see *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) [The 1966 amendments to the habeas corpus statute, especially the new section 2244(b), contemplate the possibility of relief other than immediate release from physical custody]. These cases stand for the proposition that the custodial consequences of an unlawful conviction must be invalidated on a petition for a writ of habeas corpus even if the relator would remain in a different and valid custody upon his release. *Development—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1081 (1970). As the Supreme Court has stated in language equally appropriate to this case,

> "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention. The petitioner is now serving a . . . if sentence imposed pursuant to a conviction . . . as he contends, that conviction was obtained in violation of the Constitution, then his confinement is unlawful. It is immaterial that *another* prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment." (Emphasis in original.) *Walker v. Wainwright*, 390 U.S. 355, 336-37 (1968).

It is, of course, true that if petitioner is remanded to juvenile court, that court *might* commit him to the California Youth Authority to whose jurisdiction he is presently committed by the Superior Court. But this Court may not refuse issuance of a writ upon specula-

tion as to what disposition *could* be imposed by the juvenile court. While commitment to the California Youth Authority is an authorized disposition under the Juvenile Court Law (Cal. W&I Code Section 730), so are commitments to a juvenile home, ranch, or camp or some form of probation (Cal. W&I Code Section 725, 730, 731). At this juncture it is impossible to determine which alternative the juvenile court would choose. Moreover, the particular disposition chosen by the juvenile court does not alter the illegality of the commitment order of the Superior Court, which is what is being challenged by the petition for a writ of habeas corpus.

It is also clear that commitment to the California Youth Authority by an adult court involves a confinement of considerably longer duration than a comparable commitment by the Juvenile Court. Cal. W&I Code Section 1769 provides that every person committed to the Youth Authority by the juvenile court shall be discharged upon expiration of two years or his twenty-first birthday, whichever occurs later. But under Cal. W&I Code Section 1771 every person convicted of a felony[17] and committed to the Youth Authority shall be discharged when he reaches age twenty-five unless an order for further detention has been made. Thus, the difference in the potential duration

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[17]Gary Steven Jones is clearly a convicted felon. Cal. Penal Code Section 17(a) provides, "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." Under Cal. Penal Code Section 213 robbery is punishable by imprisonment in state prison for not less than five years. Since robbery in the first degree cannot be punished by a fine or imprisonment in county jail, it can never be considered a misdemeanor. Cal. Penal Code Section 17(b) *Peopie v. Hannon*, 96 Cal.Rptr. 35 (1971).

of commitment in the present case (where petitioner was 18 years of age at sentencing) between the illegal adult court order and a lawfully imposed order of the juvenile court would be four years.

Petitioner would likewise suffer a number of disabilities from the adult court conviction which would not occur if he were merely a ward of the juvenile court. As a convicted felon his credibility could be impeached by evidence of his prior felony conviction. Cal. Evid. Code Section 788. His felony conviction would be grounds for denying him state employment [Cal. Gov. Code Section 18935(f)] or revoking it [Cal. Gov. Code Section 19[illegible]].[18] In addition, while all juvenile court records are sealable under Cal. W&I Code Section 781, records of felonies tried in adult court are not sealable. See Penal Code Section 1203.45(a). The stigma attached to the subject of such records—even though a minor at the time of his offense—has been explicity recognized by the Supreme Court of California in *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 94 Cal. Rptr. 813 (1971). With a prior felony conviction on his record petitioner would be subject to a two-year minimum term in state prison if he is convicted of a felony in the future. Cal. Penal Code Section 3024(c). In addition, he may be subject to a finding of habitual criminality under Cal. Penal Code Section 644 which would greatly increase the minimum term he would have to serve on a future conviction before release on parole. Petitioner would not suffer such increased pun-

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[18]It is also noteworthy that the Cal. Business and Professions Code lists thirty-six licensed occupations which subject licensees to disciplinary action upon conviction of a felony and/or a crime involving moral turpitude. C.E.B. *California Criminal Law Practice* Sections 25-28 (1969 ed); see also *Note*, 14 Stan.L.Rev. 533, 541 (1962).

ishment if his record indicated only that he had been a ward of the juvenile court.

Finally, and most significantly, a person committed to the California Youth Authority pursuant to a criminal conviction may be returned to the committing court if at any time that person appears to the Youth Authority,

> ". . . to be an improper person to be retained in any such institution or facility, or to be so incorrigible or so incapable of reformation under the discipline of the authority as to render his detention detrimental to the interests of the authority . . ." Cal. W&I Code Section 1737.1.

Under the same statute the youth may thereupon be sentenced to state prison for the term he could have received less the time he served at the Youth Authority. In the present case, Gary could be returned at any time to the Superior Court and sentenced to an indeterminate term of not less than five years in state prison. Cal. W & I Code Section 1737.1; Cal. Penal Code Section 213. As a ward of the juvenile court. Gary could never be sentenced to state prison even if the Youth Authority returned him to the juvenile court as unamenable to its rehabilitative processes. Cal. W&I Code Sections 1737.1. It is, therefore, abundantly apparent that a commitment to the California Youth Authority by the Superior Court carries far graver immediate and collateral consequences than a similar Juvenile Court commitment. The illegal Superior Court commitment order must be cognizable on a petition for a writ of habeas corpus. Compare *Sibron v. New York*, 390 U.S. 40, 51-55 (1968).

V. PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES AS REQUIRED BY 28 U.S.C. SECTION 2254(b). REEXHAUSTION OF THESE REMEDIES WOULD BE INEFFECTIVE TO PROTECT HIS RIGHTS.

As noted in relator's petition and in the annexed affidavit of Donald W. Pike (Exhibit "A"), petitioner exhausted his state remedies by filing petitions for a writ of habeas corpus in the Superior Court of Los Angeles County and the California Court of Appeal, Second Appellate District, and, then, by filing a petition for hearing with the Supreme Court of California. All three courts turned petitioner down, the court of Appeal writing an opinion which indicated that it had met and rejected petitioner's double jeopardy claim on the merits. Since petitioner had exhausted his state court remedies case, it obviously would have been futile for him to have raised on appeal the identical double jeopardy claim before the same courts which had previously rejected it.

Under well-established California law denial of collateral relief on the merits is res judicata and forecloses appellate relief in the same court on the same issue. *People v. Medina,* 97 Cal.Rptr. 25 (1971). In the *Medina* case, the same court which denied Gary a writ of habeas corpus had denied a petition for a writ of mandate or prohibition raising the constitutionality of a search and seizure. When petitioner sought to raise the identical constitutional issue again on appeal, the court held that it was barred from granting relief by its previous denial of appellant's writ. *Id.* at 26. Since Gary's petition for a writ of habeas corpus was rejected on the merits, it is clear under the *Medina* decision that appellate relief would not have been available to him.

28 U.S.C. Section 2254(b) provides that a state prisoner's application for a writ of habeas corpus shall be denied unless it appears that,

> ". . . the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[19]

This requirement of exhaustion has been construed to mean that it is only necessary to exhaust state remedies once. *Brown v. Allen*, 344 U.S. 443 (1953); *Grundler v. North Carolina*, 283 F.2d 798, 800 (4th Cir. 1960). This is both because 28 U.S.C. Section 2254(b) refers only to "exhaustion" and nowhere mentions as a statutory requirement "reexhaustion" and because reexhaustion of the same constitutional claim already rejected would obviously be "ineffective to protect the rights of the prisoner." 28 U.S.C. Section 2254(b).

In *Schiers v. People*, 333 F.2d 173 (9th Cir. 1964), by way of example, the defendant unsuccessfully appealed his conviction but failed to pursue a state habeas corpus remedy which was theoretically available to him. The court stated,

> "Title 28 U.S.C. Section 2254, provides that a state prisoner's application for habeas corpus 'shall not be granted unless it appears that the applicant has exhausted the remedies available in the

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[19]The Ninth Circuit has stated that this doctrine of exhaustion of state remedies is based on comity and is not jurisdictional. *O'Neil v. Nelson*, 422 F.2d 319, 323 (9th Cir. 1970).

> courts of the State . . .' This requires that 'constitutional issues arising out of state criminal prosecutions should be presented first to state courts' (Citation omitted). These issues, however, need only be presented once. (Citation omitted.)" *Id.* at 174.

And in *Evans v. Cunningham*, 335 F.2d 491 (4th Cir. 1964), the Court went even further in holding that relator Evans would not be required to exhaust his state remedies where co-defendant Sims' arguments on appeal had been rejected by the highest court in Virginia.

> "Under these circumstances, any competent lawyer would advise Evans that he was wasting his time if he undertook to persuade the Virginia Supreme Court of Appeals to reverse itself, unless he was armed with some fresh argument which Sims had not presented. Evans has none." *Id.* at 493.

There is no more reason to require Gary to reexhaust his state remedies through the state appellate process than there was to require petitioners in the above-cited cases to redundantly pursue their collateral remedies. As the aforementioned cases demonstrate, reexhaustion of state remedies is unnecessary where relator's arguments have been made and rejected on the merits. Although the exhaustion requirement has a sound basis, its purpose would be subverted by blind insistence that petitioner abortively seek an appellate remedy which in reality is illusory.

CONCLUSION

For the foregoing reasons a writ of habeas corpus should issue directing the release of Gary Steven Jones from his unlawful detention in the California Youth Authority institution in which he is presently confined, and remanding the minor to the Juvenile Court of Los Angeles County for disposition pursuant to that Court's previous finding that the minor was a person described by Cal. W&I Code Section 602.

Dated: December 2, 1971.

Respectfully submitted,

Peter Bull
Robert L. Walker
Donald W. Pike
By: /s/ Robert L. Walker
Robert L. Walker

DISTRICT COURT ORDER APPOINTING GUARDIAN AD LITEM.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Reception Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

ORDER APPOINTING GUARDIAN AD LITEM

Filed: Dec. 10, 1971.

Upon reading the petition for appointment of Guardian ad Litem, and it being deemed by the Court to be necessary and expedient, and good cause appearing therefor;

IT IS HEREBY ORDERED THAT:

LOLA MAE JONES be hereby appointed and constituted as the Guardian ad Litem of minor GARY STEVEN JONES for the purpose of initiating and maintaining the above-stated habeas corpus proceeding.

Dated: Dec. 10, 1971.

/s/ Albert Lee Stephens, Jr.

UNITED STATES DISTRICT JUDGE

DISTRICT COURT ORDER REQUIRING RESPONSE TO PETITION.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

ORDER REQUIRING RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Filed: Dec. 20, 1971.

In this action, petitioner has filed a petition for writ of habeas corpus. He is a minor in the custody of the California Youth Authority.

IT IS ORDERED that respondents serve and file their response to the petition within a period of fifteen days hereafter, unless time is extended by the Court for good cause shown.

Dated: December 17, 1971.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS PETITIONER'S CONTENTION

Filed: Jan. 10, 1972.

Petitioner's sole contention is that his trial as an adult in the California superior court was barred by the constitutional prohibition against double jeopardy since jeopardy had attached in juvenile court prior to that court's finding that he was not a fit subject for consideration under California's Juvenile Court Law.

PRELIMINARY STATEMENT

In this case, petitioner seeks to relitigate the double jeopardy issue presented to the California Court of Appeal in *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185, *hrg. denied* (Cal.Sup.Ct., Aug. 4, 1971), and resolved adversely to petitioner. Copies of all the essential records appear to have been appended to the petition, and this petitioner has exhausted his remedies in the California courts.

At this point it is instructive to review the procedural steps leading to the Juvenile Court's waiver of jurisdiction over this petitioner. On February 9, 1971, a

petition was filed in the Juvenile Court of Los Angeles County alleging that petitioner Gary Steven Jones was a person described by section 602 of the California Welfare and Institutions Code,[1] in that he had committed an act which, if committed by an adult would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and petitioner was detained pending a hearing on the petition. (*See* Exhs. D and E to Petn., pp. 19-20.)

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations

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[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. Section 602 provides:

"Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

[2]Section 701 provides:

"At the hearing, the court shall first consider only the question of whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made."

of the petition were true and that petitioner was a person described by section 602. The proceedings were continued for a dispositional hearing pursuant to section 702.[3] [A transcript of the jurisictional hearing is not appended to the petition, but its absence is not crucial because the result may be inferred from the court's comments at the dispositional hearing (*see* Exh. F. to Petn., Petn. p. 27) and because there appears to be no dispute as to the outcome of the jurisdictional hearing.]

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4] that pe-

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[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

[4]Section 707 provides:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of

(This footnote is continued on next page)

titioner was not a fit subject for treatment as a juvenile and ordered that petitioner be turned over to the Sheriff and district attorney for prosecution as an adult. (Exh. F. to Petn., Petn. p. 38.) The court based its finding of unfitness on the fact that petitioner had been involved in no less than three armed robberies. (*Id.*) The matter was set over one month for a non-appearance report as to the progress of the adult action. (*Id.*)

On April 1, 1971, the juvenile court denied a petition for writ of habeas corpus filed on behalf of this petitioner. This petition raised the same double jeopardy asserted in the instant petition. (Exhs. G and H to

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the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavorial patterns of the person being considered for unfitness."

Petn.) Thereafter this petitioner filed for habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the pending criminal prosecution of this petitioner, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185. On August 4, 1971, the California Supreme Court denied a hearing with respect to the Court of Appeal's decision. (Exh. 1 to Petn.)

Subsequently petitioner was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the superior court. Petitioner pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found petitioner guilty as charged and ordered him committed to the California Youth Authority where he is currently confined. (*See* Exhs. J-N. to Petn.)

ARGUMENT

PETITIONER WAS NOT PLACED TWICE IN JEOPARDY WHEN THE JUVENILE COURT WAIVED JURISDICTION AND ORDERED HIS PROSECUTION AS AN ADULT

Petitioner contends that the juvenile court's waiver of jurisdiction after witnesses had been sworn at the hearing pursuant to section 701 was a violation of the Fifth Amendment's prohibition against double jeopardy. Respondent submits that double jeopardy is not applicable to such a waiver of jurisdiction.

At the outset, it is clear that double jeopardy is applicable to the States through the Due Process Clause

of the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784 (1969). Although the United States Supreme Court has never expressly decided whether double jeopardy is within the panoply of due process rights made applicable to juvenile court proceedings by its decision in *In re Gault,* 387 U.S. 1 (1967), the California Supreme Court has recently applied the prohibition against double jeopardy to juvenile proceedings, holding that a second juvenile proceeding was barred where the petition had been dismissed in a prior proceeding after a hearing on the merits and under circumstances analogous to an acquittal in a criminal case. *Richard M. v. Superior Court,* 4 Cal. 3d 370, 93 Cal. Rptr. 754, 482 P.2d 664. It is respondent's position in this litigation even if double jeopardy applied to juvenile proceedings as a matter of federal law, the procedure followed in this case did not violate the Fifth Amendment.

It is readily apparent that the rationale behind the double jeopardy clause does not extend to the situation confronting the Court in this case. In *Kepner v. United States,* 195 U.S. 100, 129 (1904), the United States Supreme Court held that the protection afforded by the double jeopardy clause is protection against twice being put in jeopardy and that it applies whether the accused is convicted or acquitted. Implicit in the reasoning of the Court is the notion that there must be some disposition of the proceedings at issue which results in a definitive conclusion tantamount to either an acquittal or a conviction. In the instant case, there was no such definitive resolution of the proceedings—there was merely a transfer of petitioner's case to another forum. Such a transfer does not invoke the bar of double jeopardy.

This conclusion is defensible on either of two theories. The first is that the jurisdictional hearing and subsequent proceedings were roughly analogous to a preliminary hearing in a criminal case. It is well established that jeopardy does not attach at a preliminary hearing. *See, e.g., United States v. Dickerson,* 168 F. Supp. 899, 920 (D.D.C., 1958), *overruled on other grounds,* 271 F.2d 487 (D.C. Cir. 1959). Respondent submits that a jurisdictional hearing pursuant to section 701 (*see* note 2, *supra*) is analogous to a preliminary hearing for purposes of the California Juvenile Court Law where, as here, the juvenile court makes an order waiving jurisdiction and ordering a prosecution of the minor as an adult.

The second theory supporting the conclusion that double jeopardy did not bar this petitioner's prosecution in the adult court is the theory that persuaded the California Court of Appeal. In its decision, the Court of Appeal stated:

> "In the situation before us, while it is true that, under the language in Richard M., jeopardy had attached once the first witness had testified at the 701 hearing, no *new* jeopardy has arisen by the proceedings sending the case to the criminal court." *In re Gary Steven J.,* supra, 17 Cal. App. 3d 710. (Emphasis is court's own.)

Under this theory, the transfer of proceedings was not tantamount to either an acquittal or a conviction. Therefore, petitioner was not placed "twice in jeopardy" because the transfer did not result in any second attachment of jeopardy. In upholding a State's right to retry an accused after a reversal on appeal, the United States Supreme Court has formulated ". . . a concept of continuing jeopardy that has application where

criminal proceedings against an accused have not run their full course." *See Price v. Georgia,* 398 U.S. 323, 326 (1970). Under the circumstances of this case, it is obvious that the proceedings against petitioner had not yet run their full course when the transfer order was made. By a parity of reasoning, it should logically follow that this petitioner's criminal trial was constitutionally permissible under the "continuing jeopardy" principle.

Petitioner cites a comment of the draftsmen of the Model Rules for Juvenile Courts to the effect that once the adjudicatory hearing has begun, the child is in jeopardy and subsequent transfer to the criminal court would violate due process. (Petnr's. Pts. & Auth., p. 13.) As authority for this statement, the comment cites *Hultin v. Beto,* 396 F.2d 216 (5th Cir. 1968). The *Hultin* case holds that a child adjudged a delinquent and held in custody as such cannot be tried by a criminal court *without regard to how he may respond to the guidance given him under the juvenile law,* and does not state or hold that jeopardy, whether or not it attaches in the juvenile proceeding, precludes trial as an adult upon a finding of unfitness.

Indeed, the concept of a transfer hearing before the facts sustaining jurisdiction are found may conceivably afford *less* protection to the minor than the procedure followed in this case. First, it is difficult to perceive how a finding of unfitness can rationally be made without at least a preliminary determination that the minor committed the act charged; and secondly, the minor may be acquitted and released completely during the jurisdictional hearing, without ever having to face criminal charges in an adult court.

In the only federal case to deal squarely with the issue presented here, the court found that an inquiry into the facts of the offense prior to a transfer to adult court was essential to the function of the juvenile court. In *United States. v. Dickerson,* 271 F.2d 487, 491 (D.C. Cir. 1959), the Court of Appeals held that the "full investigation" required by the District of Columbia juvenile court laws prior to a waiver of jurisdiction contemplated at the very least an informal hearing into the allegations of the petition. The Court continued:

> ". . . Consequently, it was not improper for the Juvenile Court to conduct a hearing before determining whether or not to waive jurisdiction. To hold that jeopardy attached at that point would preclude the full and informal investigation in the interests of the minor and the community which Congress thought necessary to achieve the salutary remedial purposes of a juvenile court system." (*Id.* at 491-92.)

Respondent submits that the [*Dickerson*] decision is so closely in point as to control the disposition of this petitioner's claim.

Finally, respondent submits that if petitioner's argument were accepted, it could conceivably bar any waiver of jurisdiction by the California juvenile courts. Such a result would be unfortunate. A minor, such as petitioner, who has committed three armed robberies may well be characterized as a "hardened criminal" with respect to other youths of his same age. Retention of such an offender as a ward of the juvenile court is likely to frustrate the attempts of overworked juvenile probation officers to rehabilitate other minors who may be influenced by the behavior of such an indi-

vidual. The California Legislature undoubtedly intended that the juvenile court have the flexibility to reject such hardened individuals when it enacted section 707.

CONCLUSION

For the foregoing reasons, respondent urges that this petition for a writ of habeas corpus be denied.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General

HERBERT L. ASHBY, Chief Assistant Attorney General—Criminal Division

DORIS H. MAIER, Assistant Attorney General—Writs Section

S. CLARK MOORE, Deputy Attorney General

By /s/ Russell Iungerich

RUSSELL IUNGERICH
Deputy Attorney General
Attorneys for Respondents

(Affidavit of service omitted in printing.)

PETITIONER'S REPLY MEMORANDUM.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907 LTL.

PETITIONER'S REPLY MEMORANDUM

Filed: January 13, 1972.

Respondent forthrightly concedes either explicitly, or by implication, a number of points central to petitioner's contention that being tried twice in connection with the same incident, once in juvenile court and once in adult court, deprived him of his federal and state constitutional rights not to be twice placed in jeopardy. Respondent concedes that petitioner has exhausted his state remedies.[1] Respondent recognizes that the Supreme Court of California has held that the double jeopardy clause of the Fifth Amendment is applicable to juvenile delinquency proceedings [*Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal.Rptr. 754 (1971)], and respondent does not argue that this ruling is erroneous or that it should be rejected by this Court.[2] Respondent also concedes that for federal constitutional purposes the protection afforded by the

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[1]Respondent's Response to Petition for Writ of Habeas Corpus, p. 2, lines 3-4.

[2]*Id.*, p. 7, lines 27-32; p. 8, lines 1-4.

double jeopardy clause is available to the convicted and the acquitted on an equal basis.[3]

Nevertheless, respondent maintains that in order for an accused to be placed twice in jeopardy "there must be some disposition of the proceedings at issue which results in a definitive conclusion tantamount to either an acquittal or a conviction."[4] This statement is totally devoid of any legal foundation. The law is clear that jeopardy attaches in a non-jury trial no later than when the first witness is sworn. *United States v. Jorn,* 91 S.Ct. 547 (1971); *Wade v. Hunter,* 336 U.S. 684, 688 (1949); *Richard M. v. Superior Court,* 4 Cal.3d 370, 93 Cal.Rptr. 752 (1971). These cases establish unequivocally that once jeopardy attaches, it is constitutionally immaterial whether the proceeding is subsequently aborted or proceeds to a "definitive" conclusion.

In *United States v. Jorn, supra,* for example, 91 S. Ct. 547 (1971), the trial court declared a mistrial after the first witness was sworn. Although this trial never proceeded to a "definitive" conclusion, the district court found that the double jeopardy clause prohibited further proceedings and granted defendant's motion to dismiss a subsequently filed indictment. The United States Supreme Court agreed that defendant had been twice placed in jeopardy and affirmed the district court's dismissal of the indictment. If, as the Supreme Court found, the double jeopardy clause bars a second proceeding where the first trial culminates in a mistrial, *a fortiori* the double jeopardy principle is applicable in the case at bar where the jurisdictional hearing was

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[3]*Id.*, p. 8, lines 7-11, citing *Kepner v. United States,* 195 U.S. 100, 129 (1904).

[4]*Id.*, p. 8, lines 12-15.

concluded, and the Court sustained the petition finding Gary to be a person described by Cal. W&I Code § 602.[5]

Respondent asserts that a jurisdictional hearing in juvenile court (Cal. W&I Code § 602) is roughly analogous to a preliminary hearing in a criminal case.[6] The argument continues that since jeopardy does not attach at a preliminary hearing in a criminal case, neither does it attach at a jurisdictional hearing in juvenile court.

The Achilles heel in this reasoning is, of course, that a jurisdictional hearing is comparable to a criminal trial and not to a preliminary hearing. If this were not true, the Supreme Court would not have held that at a *jurisdictional hearing* a minor must be accorded his right to confront and cross-examine his accusers [*In re Gault*, 387 U.S. 1 (1967)], and to be tried in accordance with a reasonable doubt standard [*In re Winship*, 397 U.S. 358 (1970)], rights not granted to adult criminals at preliminary hearings. Similarly, the California Supreme Court has held that the juvenile court may not examine a minor's probation report at the jurisdictional hearing precisely because it would prejudice the Court's determination of guilt or innocence. *In re Gladys R.*, 1 Cal.3d 855, 83 Cal. Rptr. 671 (1970).

Section 701 of the Cal. W&I Code establishes the rules governing jurisdictional hearings. It provides that at such a hearing. ". . . the [juvenile] court shall first consider only the question whether the minor is a per-

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[5]The junvenile court's minute order was annexed to relator's petition as Exhibit "E".

[6]Respondent's Response to Petition for Writ of Habeas Corpus, p. 8, lines 26-31.

son described by Section . . . 602. . . ." Cal. W&I Code § 602 provides, in pertinent part,

> "Any person under the age of 21 years who violates any law of this State or of the United States . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Since under this language the juvenile court is required to find the minor's guilt of an underlying law violation in order for the court to adjudicate him a person described by Cal. W&I Code § 602, this proceeding is clearly akin to a criminal trial, and not to a preliminary hearing.[7]

Respondent cites *Price v. Georgia,* 398 U.S. 323 (1970), for the proposition that the United States Supreme Court has formulated a concept of continuing jeopardy which applies where criminal proceedings have not run their full course.[8] But the language in *Price* refers to a situation where a defendant appeals and obtains a reversal of his conviction. It is, of course, well-established that double jeopardy does not prohibit the State from retrying a defendant who has secured a reversal on appeal. See *Green v. United States,* 355 U.S.

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[7]The Juvenile Court Law's analogue to a preliminary hearing in a criminal case is the detention hearing. "Unless sooner released, a minor taken into custody under the provision of this article shall be brought before a judge or referee of the juvenile court for a hearing (which shall be referred to as a 'detention hearing') to determine whether the minor shall be further detained, as soon as possible but in any event before the expiration of the next judicial day after a petition to declare such minor a ward . . . has been filed. If the minor is not brought before a judge or referee of the juvenile court within the period prescribed by this section, he shall be released from custody." Cal. W&I Code § 632. The standards for detention are set forth in Cal. W&I Code § 636.

[8]Respondent's Response to Petition for Writ of Habeas Corpus, p. 9, lines 19-20.

184, 189 (1957); *United States v. Ball,* 163 U.S. 662 (1896). By filing a notice of appeal the defendant has waived his right to plead jeopardy as a bar to a subsequent prosecution.[9]

But the remand of Gary Steven Jones from juvenile to adult court cannot be attributed to a voluntary act or decision by the minor. Since Gary opposed the transfer of jurisdiction from juvenile to adult court, and interposed a plea of "once convicted, once in jeopardy," he clearly did not waive his right to be protected by the double jeopardy prohibition. His case is similar to *United States v. Sabella,* 272 F.2d 206 (2d Cir. 1959), where defendants challenged on appeal the legality of their sentences but did not attack the validity of their convictions. Since they themselves had not put in issue the legality of their convictions, and since they had not waived any rights emanating from the prohibition against double jeopardy, the court held that a second trial in connection with the same underlying incident would be barred.

In short, the doctrine of "continuing jeopardy" is a bugaboo which has no basis in law except insofar as it is inartfully employed to justify a retrial following a successful appeal. Where the defendant is tried twice for the same underlying offense, where each trial results in a finding that he committed the act of which he was accused, and where each trial exposes him "to his loss of liberty for years" [*In re Gault,* 387 U.S. 1, 36 (1967)], it would be the sheerest caprice to claim that the defendant should not be immune from this

[9]It is also evident that our entire system of appellate review of criminal convictions is premised upon the appellate court's power to remand for a retrial. Appellate courts would most certainly be reluctant to reverse criminal convictions if every reversal insulated the defendant from subsequent prosecution.

double prosecution because the juvenile court proceeding was terminated prior to disposition. See *United States v. Jorn,* 91 S.Ct. 547 (1971). Nor may petitioner's constitutional rights be adulterated because the two proceedings were conducted in different courts using different legal nomenclature. *United States v. Dickerson,* 168 F.Supp. 899, 902 (D.D.C. 1958), *rev'd on other grounds,* 271 F.2d 487 (D.C.Cir. 1959).

There is no inherent difficulty in holding the "fitness" or "transfer of jurisdiction" hearing (Cal. W&I Code § 707) prior to the jurisdictional hearing (Cal. W&I Code § 701). According to the California Supreme Court, the only factor which the juvenile court must consider at the section 707 hearing is the minor's behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court,* 3 Cal.3d 709, 714, 91 Cal.Rptr. 601, 603 (1970). No reason exists why such a report could not be prepared for use at a "fitness" hearing conducted prior to the jurisdictional hearing.

Respondent suggests that a finding of unfitness cannot rationally be made without a determination that the minor committed the act charged.[10] This view is open to question since the California Supreme Court, in considering the subject, has declined to promulgate this requirement. That Court stated only that the juvenile court may consider, among other factors, "the nature of the crime allegedly committed" and "the circumstances and details surrounding its commission" [*Jimmy H. v. Superior Court,* 3 Cal.3d 709, 714, 91

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[10]Respondent's Response to Petition for Writ of Habeas Corpus, p. 10, lines 10-13.

Cal.Rptr. 600, 604 (1970)]; and one court has overturned a finding of unfitness because the only factor considered by the juvenile court was the seriousness of the underlying crime [*Bruce M. v. Superior Court,* 270 CA2d 566, 75 Cal.Rptr. 881, 884 (1969)]. In fact Cal. W&I Code § 707 itself provides (in pertinent part),

> "In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provision of the Juvenile Court Law."

Thus, under Cal. W&I Code § 707 the determination as to whether a minor is amenable to the care, treatment, and training program available through the facilities of the juvenile court may, or may not, encompass an examination into the nature of the case against the minor. But, in any event, any preliminary determination of guilt which the juvenile court may wish to make has, of necessity, already been made at the detention hearing where the probation department is required to show that detention is "a matter of immediate and urgent necessity for the protection of such minor or the person or property of another . . ." Cal. W&I Code § 636. The Supreme Court of California has clearly stated,

> ". . . in a delinquency [detention] hearing the probation officer will be required to present a prima facie case that the minor committed the offense, since the 'immediate and urgent necessity' for detention is necessarily premised upon the assumption." *In re William M.,* 3 Cal.3d 16, 28, 89 Cal.Rptr. 33, n.20 at 28, 41 (1970).

Since the fitness hearing focuses upon the minor's amenability to treatment, and not his guilt of the underlying offense, the examination into whether there is a prima facie case at the detention hearing, supplemented by whatever investigation the court chooses to make at the fitness hearing, will provide the court with more than a sufficient factual basis for its fitness determination.[11]

The experts on delinquency have agreed that fitness hearings can and should be conducted prior to the inception of the jurisdictional hearing. Thus, Rule 9 of the Model Rules for Juvenile Courts, prepared by the Council of Judges of the National Council on Crime and Delinquency (1968), provides:

> "If at any time after the filing of a petition and *prior to the commencement of the adjudicatory hearing* the court is informed that the child is legally subject to transfer to criminal court, and that there is reason to believe that retention of jurisdiction in the juvenile court is contrary to the best interests of the child or the public, a transfer hearing may be scheduled, and the probation departments shall conduct a transfer investigation." [Emphasis supplied.]

And Section 34(a) of the third tentative draft [May, 1968] of the Uniform Juvenile Court Act, prepared by the American Bar Association National Institute, similarly provides,

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[11]It is constitutionally irrelevant that Gary Steven Jones could have been acquitted during the jurisdictional hearing. The same comment could be said about the defendants in *Kepner v. United States*, 195 U.S. 100 (1904), or *In re Nielson*, 131 U.S. 176 (1889), where it was held that double jeopardy prohibited second prosecutions. And the fact remains that petitioner, like the defendants in those cases, was—in fact—convicted.

> "After a petition has been filed charging delinquency based on conduct which is designated a public offense under the laws, including local ordinances, of this state the court may, *before hearing the petition on its merits,* transfer the offense for criminal prosecution to the appropriate Court having jurisdiction of the offense. . . ." [Emphasis supplied.]

And, as we have noted before, the former Presiding Judge of the Los Angeles Juvenile Court is of the view that his court would not be hampered by a ruling that the fitness determination must be reached before jeopardy attaches at the jurisdictional hearing.[12]

There is, therefore, no basis to conclude that the relief petitioner seeks is not practically feasible, as well as constitutionally compelled. But, assuming a certain amount of inconvenience, such inconvenience cannot justify denial of a right of constitutional magnitude. See *Baldwin v. New York,* 399 U.S. 66 (1970); *Bramlett v. Peterson,* 307 F.Supp. 1311, 1316-1317 (M.D.Fla. 1969); *Phillips v. Cole,* 298 F.Supp. 1049, 1053 (N.D.Miss. 1968). The double jeopardy clause is absolute in its language and fundamental to our criminal and juvenile justice systems alike. The clash between existing California procedure for determining fitness and the historic principle of double jeopardy must, under the Supremacy Clause, be reconciled in favor of the constitutional guarantee. Cf. *Mayer v. Chicago,* 40 U.S.L.W. 4055 (1971).

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[12]See Exhibit "H", annexed to relator's petition, p. 62.

Conclusion

For the foregoing reasons and the reasons presented in the Points and Authorities in Support of Relator's Petition for a Writ of Habeas Corpus, this Court must issue a writ of habeas corpus directing respondents BREED and McKIBBEN to release GARY STEVEN JONES from his present unlawful detention and remanding him to the Juvenile Court of Los Angeles County for disposition.

Dated: January 12, 1972.

Respectfully submitted,

Peter Bull

Robert L. Walker

Donald W. Pike

By /s/ Robert L. Walker

Robert L. Walker

(Certificate of Service omitted in printing).

DISTRICT COURT ORDER FOR HEARING.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

Filed: Jan. 27, 1972.

ORDER FOR HEARING

In this action, a petition for writ of habeas corpus has been filed. Pursuant to this Court's Order, a response has been filed by respondents. Petitioner has filed a reply memorandum thereto.

IT IS ORDERED that a hearing on this petition and the pleadings be set for March 6, 1972, at 10:00 a.m.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order by mail this date on the petitioner and on the respondents.

DATED: January 27, 1972.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

DISTRICT COURT MINUTES, MARCH 6, 1972.

United States District Court, Central District of California.

Civil Minutes—General.

Date March 6, 1972.

Case No. 71-2907-LTL.

Title Gary Steven Jones -vs- Allen F. Breed, et al.

Docket Entry: Held hrg & ent ord (LTL) Petn's petn for O.S.C. Why petn for Writ of H/C should not be issued is ord submitted. (LTL).

Present: Hon. Lawrence T. Lydick, Judge; R. A. Klein, Deputy Clerk; Barbara J. Killion, Court Reporter.

Attorneys Present for Plaintiffs: Robert L. Walker, Donald W. Pike.

Attorneys Present for Defendants: Russell Iungerich.

Proceedings: Hearing: Petitioner's Petition for Order to Show Cause Why Petitioner's Petition for Writ of Habeas Corpus should not be issued.

Court orders said petition stands submitted.

MEMORANDUM AND ORDER OF DISTRICT COURT DENYING PETITION FOR WRIT OF HABEAS CORPUS.

(This document has been omitted from this Appendix because it appears as Appendix B to the Petition for Writ of Certiorari at pages 16-19.)

NOTICE OF APPEAL.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907 LTL.

Filed: June 5, 1972.

NOTICE IS HEREBY GIVEN that GARY STEVEN JONES, by and through his guardian ad litem, LOLA MAE JONES, petitioner, appeals to the United States Court of Appeals for the Ninth Circuit from the order dated May 5, 1972, filed May 5, 1972, denying petitioner's petition for a writ of habeas corpus.

Dated: May 26, 1972.

PETER BULL
ROBERT L. WALKER
DONALD W. PIKE
Attorneys for Petitioner-Appellant

By /s/ Robert L. Walker
ROBERT L. WALKER

DISTRICT COURT ORDER DENYING CERTIFICATE OF PROBABLE CAUSE.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. No. 71-2907-LTL.

ORDER

Filed: June 21, 1972.

The Petition for Certificate of Probable Cause in the above matter is denied.

DATED: June 21, 1972.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

COURT OF APPEALS ORDER, GRANTING CERTIFICATE OF PROBABLE CAUSE.

United States Court of Appeals, for the Ninth Circuit.

Gary Steven Jones, Petitioner, vs. Allen F. Breed, Director of The California Youth Authority, et al., Respondents. Misc. 72-8021, DC 71-2907 (LTL) C. Cal.

ORDER

Filed: Aug. 31, 1972.

Petitioner, a California state prisoner, seeks a certificate of probable cause for appeal from an order denying a petition for a writ of habeas corpus.

An issue being raised that is not frivolous, the application is granted.

/s/ Richard H. Chambers

United States Circuit Judge

COURT OF APPEALS ORDER GRANTING MOTION TO APPEAL IN FORMA PAUPERIS.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, A Minor, By Lola Mae Jones, Guardian ad litem, Petitioner-Appellant, vs. Allen F. Breed, Director of The California Youth Authority, et al., Respondents-Appellees. 72-2644, DC 71-2907 (LTL) C. Cal.

ORDER

Filed: September 25, 1972.

An application for a certificate of probable cause was granted in this court on August 31, 1972.

The motion to appeal in forma pauperis is granted.

/s/ Richard H. Chambers

United States Circuit Judge

OPINION OF THE COURT OF APPEALS.

(This document has been omitted from this Appendix because it appears as Appendix A to the Petition for Writ of Certiorari at pages 1-15.)

PETITION FOR STAY OF MANDATE.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

PETITION FOR STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI
And
PROPOSED STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI
PURSUANT TO RULE 41(b)

Filed: May 31, 1974.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

PETITION FOR STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI

Pursuant to Rule 41(b), the appellees herein petition this Court for a stay of the mandate pending their application to the United States Supreme Court for a writ of certiorari.

The appellees submit that the double jeopardy issue decided by this Court is an important question not previously passed upon by the United States Supreme Court and involves a conflict of decisions. These factors combine to create a substantial prospect that this case may command four votes for review in this Supreme Court. No decision of the United States Supreme Court has held that double jeopardy applies to juvenile court proceedings, let alone to the transfer proceedings between juvenile court and adult court which were involved in this case. In addition to the fact that the question involved is both important and novel, this Court's decision in effect overrules the decisions of the California courts which held that a juvenile's prosection in both the juvenile and adult courts was one proceeding involving "continuing jeopardy." *Bryan v. Superior Court*, 7 Cal. 3d 575, 578, 102 Cal. Rptr. 831, 498 P.2d 1079 (1972), *cert. denied*, 410 U.S. 944 (1973); *In re Gary J.*, 17 Cal. App. 3d 704 (1971). This Court's decision also conflicts with the earlier federal case of *United States v. Dickerson*, 271 F.2d 487 (D.C. Cir. 1959). Thus, both the importance and novelty of the question involved and the apparent conflict of decisions makes this case an appropriate one for the granting of a stay of the mandate because of the substantial prospect that this case may command four votes for review. *See Organized Village of Kake v. Egan*, 89 S. Ct. 33, 35, 4 L. Ed. 2d 34 (1959) (opinion of Mr. Justice Brennan as Circuit Justice).

Unless a stay is granted, this Court's decision will likely result in appellant's release from all custody before the United States Supreme Court has an opportunity to rule on the petition for a writ of certiorari. At present, appellant is on parole from the California

Youth Authority under a commitment which will last until 1978 unless terminated earlier. On June 22, 1974, appellant Jones will reach his 21st birthday and will no longer be subject to the jurisdiction of the California Juvenile Court for the further proceedings outlined in this Court's opinion. If the mandate of this Court were stayed pursuant to Rule 41(b), appellant Jones would remain on Youth Authority parole until sometime in October of 1974, when a ruling on the petition for certiorari would likely be handed down. In the event that appellees were ultimately successful on the merits, a release of appellant Jones from his constructive custody on parole at this juncture might result in the disruption of his life by reapprehension if and when a Supreme Court decision favorable to appellees became effective.

Since the issue involved in this case is one of importance and also one of first impression, the appellees submit that the substantial prospects of a favorable ruling on a petition for certiorari should militate in favor of the grant of this stay so that the appellees are not required to comply with this Court's order until after their remedy by way of certiorari has been exhausted.

WHEREFORE, the appellees pray that the mandate of this Court which will issue on June 5, 1974, be stayed for 30 days pending the timely filing of a petition for writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

DATED: May 29, 1974.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
of the State of California

JACK R. WINKLER, Chief Assistant Attorney General—Criminal Division

S. CLARK MOORE
Assistant Attorney General

By /s/ Russell Iungerich
RUSSELL IUNGERICH
Deputy Attorney General

Attorneys for Respondents-Appellees

(Affidavit of service by mail omitted in printing.)

OPPOSITION TO PETITION FOR STAY OF MANDATE.

In the United States Court of Appeals, for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

OPPOSITION TO PETITION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

For a party to interfere with the normal course of appellate processes by obtaining a stay of the Court of Appeal's mandate, he must meet two clearly established criteria. *First,* he must demonstrate irreparable injury.[1] *Second,* he must demonstrate that there is a substantial likelihood that at least four justices of the Court will vote to grant certiorari.[2] In the case of the present application, neither condition for relief has been satisfied.

The only reference to irreparable injury in appellee's petition is the possibility that appellant—who is presently on parole from the California Youth Authority—might be reapprehended if appellees ultimately prevail in the Supreme Court. This purported injury, however, is not an injury to appellees. It is certainly an ex-

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[1]See *Long Beach Federal Savings and Loan Assn. v. Federal Home Loan Bank,* 80 S.Ct. 18 (1955) [op. of Douglas, J. as Circuit Justice]; *English v. Cunningham,* 80 S.Ct. 18 (1959) [op. of Frankfurter, J. as Circuit Justice].

[2]See *Edwards v. New York,* 76 S.Ct. 1058, 1059 (1956) [op. of Harlan, J. as Circuit Justice].

traordinary perversion of the irreparable injury rule for the losing party to assert that irreparable injury might, therefore, befall *the party who has prevailed.*

In addition, appellees' fears are entirely speculative. Even if appellees were to ultimately prevail, there is no reason for appellant to be rearrested. The probable remedy would be for the judgment of conviction to be reinstated and for appellant to revert to his previous status as a CYA parolee. *Finally,* this minimal inconvenience can not properly be considered an *irreparable* injury.[3]

Appellees have also failed to demonstrate either that this court's opinion is erroneous, or that there is any likelihood that their certiorari petition will be granted. While a conflict between circuits is a criterion used in ruling upon certiorari petitions, no conflict exists here. The only other case from a Circuit Court of Appeal, *Fain v. Duff,* 488 F.2d 218 (5th Cir. 1973), is squarely in agreement with this Court's decision. Although appellees assert that there is a conflict between *Jones v. Breed* and *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), the differences between the two cases were carefully considered by this Court in its opinion.[4] As this Court correctly noted, the statements in *Dickerson* in conflict with this Court's decision are dicta and have been undermined by *Kent, Gault,* and *Winship.*[5]

Finally, there is no disagreement among the courts as to the applicability of the double jeopardy guarantee to juvenile delinquency proceedings. As this Court discussed in its opinion, the states which have recently

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[3]See *Long v. Robinson,* 432 F.2d 977, 980 (4th Cir. 1970).
[4]Slip op. at p. 10.
[5]*Ibid.*

considered this issue have unanimously ruled that the double jeopardy clause is applicable in the juvenile court.[6] There is no reason to believe that the Supreme Court would reach out to resolve an issue upon which the state courts have been in universal agreement.

CONCLUSION

For the foregoing reasons appellees' petition for a stay of this Court's mandate should be denied.

Dated: June 3, 1974.

Respectfully submitted,

/s/ Robert L. Walker
Robert L. Walker
Attorney for Petitioner-Appellant

(Certificate of Service omitted in printing.)

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[6]See *Richard M. v. Superior Court*, 4 Cal.3d 370, 482 P.2d 664 (1971); *Anonymous v. Superior Court*, 10 Ariz. App. 243, 457 P.2d 956 (1969); *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *State v. Halverson*, 192 N.W.2d 765 (Iowa 1971); *Collins v. State*, 429 S.W. 2d 650 (Tex. App. 1968); *Colorado in Interest of J.A.M.*, 483 P.2d 362 (Colo. Sup. Ct. 1971).

ORDER STAYING ISSUANCE OF MANDATE.

United States Court of Appeals, for the Ninth Circuit.

Gary Stevens Jones, etc., Petr-appellant vs. Allen F. Breed, etc., et al., Respdts-appellees. No. 72-2644.

ORDER STAYING ISSUANCE OF MANDATE

Filed: June 18, 1974.

Upon application of Russell Iungerich, counsel for the appellees, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellees herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before July 5, 1974.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ J. Clifford Wallace

United States Circuit Judge.

Dated: San Francisco, Calif. June 11, 1974.